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WHEN: Tuesday, April 15, 2008
9:00 a.m.–Noon

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 905

[Docket No. AMS–FV–07–0017; FV07–905–610 Review]

Oranges, Grapefruit, Tangerines and Tangelos Grown in Florida; Section 610 Review

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Confirmation of regulations.

SUMMARY: This action summarizes the results under the criteria contained in section 610 of the Regulatory Flexibility Act (RFA), of an Agricultural Marketing Service (AMS) review of Marketing Order No. 905, regulating the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida (order). AMS has determined that the order should be continued.

ADDRESSES: Interested persons may obtain a copy of the review. Requests for copies should be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or E-mail: *moab.docketclerk@usda.gov.* A copy of the review may also be obtained via the Internet at: *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Doris Jamieson or Christian D. Nissen, Southeast Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Winter Haven, Florida 33884; Telephone: (863) 324–3375; Fax: (863) 325–8793; or E-mail: *Doris.Jamieson@usda.gov* or *Christian.Nissen@usda.gov.*

SUPPLEMENTARY INFORMATION: Marketing Order No. 905, as amended (7 CFR part 905), regulates the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The order establishes the Citrus Administrative Committee (Committee) as the administrative body charged with overseeing program operations. Staff is hired to conduct the daily administration of the program. The Committee consists of 18 members. There are nine grower members representing four districts, and eight shipper members representing both independent shippers and cooperative marketing organizations, and one nonindustry member who represents the public. Each member has an alternate. Grower members and alternate members are elected through nomination meetings held in each district. Shipper members and alternate members are elected at a nomination meeting of shippers. The public member and alternate are nominated by the Committee.

Currently, there are approximately 8,000 producers and approximately 75 handlers of Florida citrus. The majority of growers and handlers may be classified as small entities. The regulations implemented under the order are applied uniformly and are designed to benefit all entities, regardless of size.

AMS published in the **Federal Register** on February 18, 1999 (64 FR 8014), a plan to review certain regulations, including Marketing Order No. 905, under criteria contained in section 610 of the RFA (5 U.S.C. 601–612). Updated plans were published in the **Federal Register** on January 4, 2002 (67 FR 525), August 14, 2003 (68 FR 48574), and again on March 24, 2006 (71 FR 14827). Accordingly, AMS published a notice of review and request for written comments on the Florida citrus marketing order in the June 20, 2007, issue of the **Federal Register** (72 FR 33918). The deadline for comments ended August 20, 2007. Two comments were received in response to the notice, and are discussed later in this document.

The review was undertaken to determine whether the Florida citrus marketing order should be continued without being changed, amended, or rescinded to minimize the impacts on small entities. In conducting this review, AMS considered the following factors: (1) The continued need for the order; (2) the nature of complaints or comments received from the public concerning the order; (3) the complexity of the order; (4) the extent to which the order overlaps, duplicates, or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and (5) the length of time since the order has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the order.

The order authorizes grade, size, maturity, and quality regulations, as well as reporting and inspection requirements. The order also authorizes volume regulation by limiting the shipments of any grade or size of any variety. The grade, size, maturity, and inspection regulations are also applied to imported grapefruit and oranges under section 608e of the Act.

The grade, size, and maturity requirements have helped maintain demand for Florida citrus over the years by ensuring only quality product reaches the consumer. The volume control provisions of the order have helped stabilize supplies and prices of red seedless grapefruit by preventing the market from being flooded with small sizes during the early part of the season. The compilation and dissemination of aggregate statistical information collection from handlers is used by the industry to make informed production and marketing decisions. Funds to administer the order are obtained from handler assessments.

Regarding complaints or comments received from the public concerning the order, AMS received two comments. One comment raised issues concerning country of origin labeling, which is outside the scope of this 610 review. One comment was in favor of the continuation of the order and addressed three of the five factors under consideration by AMS. The commenter noted that the marketing order helps to ensure high quality Florida citrus reaches the fresh market. The commenter also favored the Department's policy of recognizing small businesses and reviewing customer complaints.

Marketing order issues and programs are discussed at public meetings, and all interested persons are allowed to express their views. All comments are considered in the decision making process by the Committee and the AMS before any program changes are implemented.

In considering the order's complexity, AMS has determined that the order is not unduly complex.

During the review, the order was also checked for duplication and overlap with other regulations. AMS did not identify any relevant Federal rules, or State and local regulations that duplicate, overlap, or conflict with the marketing order for Florida citrus. The Florida Department of Citrus, a state organization, is authorized to conduct marketing promotion programs and research for the Florida citrus industry. The marketing order currently does not have authority for marketing promotion and research.

The order was established in 1939 and was last amended in September, 1989. During the 68 years the order has been effective, AMS and the Florida citrus industry have continuously monitored marketing operations. Changes in regulations have been implemented to reflect current industry operating practices, and to solve marketing problems as they occur. The goal of periodic evaluations is to ensure that the order and the regulations implemented under it fit the needs of the industry and are consistent with the Act.

The Committee meets several times a year to discuss the order and the various regulations issued thereunder, and to determine if, or what, changes may be necessary to reflect current industry practices. As a result, regulatory changes have been made numerous times over the years to address industry operation changes and to improve program administration. In addition, in May 2007, the Committee voted to amend the order, recommending several changes including adding the authority for research and promotion under the order. Currently, there is an on-going formal rulemaking proceeding to amend the order (see 73 FR 5130).

Based on the potential benefits of the order to producers, handlers, and consumers, AMS has determined that the Florida citrus marketing order should be continued. The order was established to help the Florida citrus industry work with USDA to solve marketing problems. The order's regulations on grade, size, quality, and maturity continue to be beneficial to producers, handlers, and consumers. AMS will continue to work with the Florida citrus industry in maintaining an effective marketing order program.

Dated: March 12, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–5359 Filed 3–17–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916 and 917

[Docket No. AMS–FV–07–0160; FV08–916/917–1 IFR]

Nectarines and Peaches Grown in California; Changes in Handling Requirements for Fresh Nectarines and Peaches

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule changes the handling requirements applicable to well matured fruit covered under the nectarine and peach marketing orders (orders). The orders regulate the handling of nectarines and peaches grown in California and are administered locally by the Nectarine Administrative and Peach Commodity Committees (committees). This rule updates the variety-specific size requirements to reflect changes in commercially significant varieties. This will enable handlers to continue to ship fresh nectarines and peaches in a manner that meets consumer needs, increases returns to producers and handlers, and reflects current industry practices.

DATES: Effective March 19, 2008; comments received by May 19, 2008 will be considered prior to issuance of any final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938, or Internet: *http://www.regulations.gov.* All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection at the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jennifer Garcia, Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906; or E-mail: *Jen.Garcia@usda.gov* or *Kurt.Kimmel@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order Nos. 916 and 917, both as amended (7 CFR parts 916 and 917), regulating the handling of nectarines and peaches grown in California, respectively, hereinafter referred to as the ''orders.'' The orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule changes the handling requirements applicable to well matured fruit covered under the nectarine and

peach orders. This rule updates the variety-specific size requirements to reflect changes in commercially significant varieties. These changes will enable handlers to continue to ship fresh nectarines and peaches in a manner that meets consumer needs, increases returns to producers and handlers, and reflects current industry practices.

Sections 916.52 and 917.41 of the orders provide authority for handling regulations for fresh California nectarines and peaches. The regulations may include grade, size, maturity, quality, pack, and container requirements. The orders also provide that whenever such requirements are in effect, the fruit subject to such regulation must be inspected by the Federal or Federal-State Inspection Service (Inspection Service) and certified as meeting the applicable requirements.

The nectarine order has been in effect since 1939, and the peach program has been in effect since 1958. The orders have been used over the years to establish a quality control program that includes minimum grades, sizes, and maturity standards. That program has helped improve the quality of product moving from the farm to market, and has helped growers and handlers more effectively market their crops. Additionally, the orders have been used to ensure that only satisfactory quality nectarines and peaches reach the consumer. This has helped increase and maintain market demand over the years.

Sections 916.53 and 917.42 authorize the modification, suspension, or termination of regulations issued under §§ 916.52 and 917.41, respectively. Changes in regulations have been implemented to reflect changes in industry operating practices and to solve marketing problems as they arise. The committees meet whenever needed, but at least annually, to discuss the orders and the various regulations in effect and to determine if, or what, changes may be necessary to reflect industry needs. As a result, regulatory changes have been made numerous times over the years to address industry changes and to improve program operations.

Currently, handling requirements are in effect for nectarines and peaches packed in containers marked ''CA WELL MAT'' or ''California Well Matured.'' The term ''well matured'' is defined in the orders' rules and regulations, and has been used for many years by the industry to describe a level of maturity higher than the definition of ''mature'' in the United States Standards for Grades of Nectarines (7 CFR 51.3145 through 51.3160) and United States Standards for Grades of Peaches (7 CFR 51.1210 through 51.1223). Other handling requirements were suspended in 2007 to reduce handler inspection costs.

The committees met on December 18, 2007, and unanimously recommended that the handling requirements be revised for the 2008 season, which is expected to begin in April. No official crop estimate was available at the time of the committees' meetings because the nectarine and peach trees were dormant. The committees will recommend a crop estimate at their meetings in early spring.

Both orders provide authority (in §§ 916.52 and 917.41) to establish size requirements. Size regulations encourage producers to leave fruit on the tree longer, which improves both the size and maturity of the fruit. Acceptable fruit size provides greater consumer satisfaction and promotes repeat purchases, thereby increasing returns to producers and handlers. In addition, increased fruit size results in increased numbers of packed containers of nectarines and peaches per acre, which is also a benefit to producers and handlers.

Varieties recommended for specific size regulations have been reviewed and such recommendations are based on the specific characteristics of each variety. The committees conduct studies each season on the range of sizes attained by the regulated varieties and those varieties with the potential to become regulated, and determine whether revisions to the size requirements are appropriate.

Nectarines: Section 916.356 of the order's rules and regulations specifies minimum size requirements for fresh nectarines in paragraphs (a)(2) through (a)(9). This rule revises paragraphs (a)(3), (a)(4), and (a)(6) of § 916.356 to establish variety-specific minimum size requirements for 11 varieties of nectarines that were produced in commercially significant quantities of more than 10,000 containers for the first time during the 2007 season. This rule also removes the variety-specific minimum size requirements for four varieties of nectarines whose shipments fell below 5,000 containers during the 2007 season.

For example, one of the varieties recommended for addition to the variety-specific minimum size requirements is the Burnecteleven (Summer Flare® 30) variety of nectarines, recommended for regulation at a minimum size 84. A minimum size of 84 means that a packed standard lug box will contain not more than 84 nectarines. Studies of the size ranges attained by the Burnecteleven (Summer Flare® 30) variety revealed that 100 percent of the containers met the minimum size of 84 during the 2006 and 2007 seasons. Sizes ranged from size 30 to size 70, with 9.6 percent of the fruit in the 30 sizes, 50 percent of the packages in the 40 sizes, 32.9 percent in the 50 sizes, 6.2 percent in the 60 sizes, and 1.3 percent in the 70 sizes.

A review of other varieties with the same harvesting period indicated that the Burnecteleven (Summer Flare® 30) variety was also comparable to those varieties in its size ranges for that time period. Discussions with handlers known to handle the variety confirm this information regarding minimum size and harvesting period, as well. Thus, the recommendation to place the Burnecteleven (Summer Flare® 30) variety in the variety-specific minimum size regulation at a minimum size 84 is appropriate. This recommendation results from size studies conducted over a two-year period.

Historical data such as this provides the committee with the information necessary to recommend the appropriate sizes at which to regulate various nectarine varieties. In addition, producers and handlers of the varieties affected are personally invited to comment when such size recommendations are deliberated. Producer and handler comments are also considered at both committee and subcommittee meetings when the staff receives such comments, either in writing or verbally.

For reasons similar to those discussed in the preceding paragraph, paragraph(a)(3) of § 916.356 is revised to include the Polar Ice and Polar Light nectarine varieties; paragraph (a)(4) of § 916.356 is revised to include the Burnectthirteen (Snow Flare® 22), Burnectfourteen (Snow Flare® 21), and White Sun nectarine varieties; and paragraph (a)(6) of § 916.356 is revised to include the Burnecteleven (Summer Flare® 30), Burnectfifteen (Summer Flare® 27), Grand Bright, La Reina, Saucer, and Sugar Pearl™ nectarine varieties.xxx

This rule also revises paragraph (a)(6) of § 916.356 to remove the August Snow, Prima Diamond XVIII, Sparkling Red, and Summer Grand nectarine varieties from the variety-specific minimum size requirements because fewer than 5,000 containers of each of these varieties were produced during the 2007 season. Nectarine varieties removed from the nectarine variety-specific minimum size requirements become subject to the non-listed variety

size requirements specified in paragraphs (a)(7), (a)(8), and (a)(9) of § 916.356.

Peaches: Section 917.459 of the order's rules and regulations specifies minimum size requirements for fresh peaches in paragraphs (a)(2) through (a)(6), and paragraphs (b) and (c). This rule revises paragraphs (a)(2), (a)(3), (a)(5), and (a)(6) of § 917.459 to establish variety-specific minimum size requirements for 15 peach varieties that were produced in commercially significant quantities of more than 10,000 containers for the first time during the 2007 season. This rule also removes the variety-specific minimum size requirements for eight varieties of peaches whose shipments fell below 5,000 containers during the 2007 season.

For example, one of the varieties recommended for addition to the variety-specific minimum size requirements is the Super Lady variety of peaches, which was recommended for regulation at a minimum size 96. A minimum size of 96 means that a packed standard lug box contains not more than 96 peaches. Studies of the size ranges attained by the Super Lady variety revealed that 98.9 percent of the containers met the minimum size of 96 during the 2006 and 2007 seasons. The sizes ranged from size 40 to size 96, with 6.9 percent of the containers meeting the size 40, 4 percent meeting the size 50, 20.5 percent meeting the size 60, 29.8 percent meeting the size 70, 15.6 percent meeting the size 80, 4.5 percent meeting the size 84, 4.9 percent meeting the size 88, and 12.7 percent meeting the size 96 in the 2007 season.

A review of other varieties with the same harvesting period indicated that the Super Lady variety was also comparable to those varieties in its size ranges for that time period. Discussions with handlers known to pack the variety confirm this information regarding minimum size and the harvesting period, as well. Thus, the recommendation to place the Super Lady variety in the variety-specific minimum size regulation at a minimum size 96 is appropriate.

Historical data such as this provides the committee with the information necessary to recommend the appropriate sizes at which to regulate various peach varieties. In addition, producers and handlers of the varieties affected are personally invited to comment when such size recommendations are deliberated. Producer and handler comments are also considered at committee meetings when the staff receives such comments, either in writing or verbally.

For reasons similar to those discussed in the preceding paragraph, paragraph (a)(2) of § 917.459 is revised to include the Supechfifteen and Super Lady peach varieties; paragraph (a)(5) of § 917.459 is revised to include the Crimson Queen, Sauzee Queen, and Supechnine peach varieties; and paragraph (a)(6) of § 917.459 is revised to include the Burpeachtwentyone (Summer Flame® 26), Candy Princess, Jasper Flame, Natures #10, Peach-N-Cream, Queen Jewel, September Blaze, Strawberry, Summer Fling, and Sweet Henry peach varieties.

This rule also revises paragraph (a)(2) of § 917.459 to remove the Sugar Snow peach variety; paragraph (a)(3) of § 917.459 to remove the May Snow peach variety; paragraph (a)(5) of § 917.459 to remove the Raspberry, Sugar Jewel, and Sunlit Snow peach varieties; and paragraph (a)(6) of § 917.459 to remove the Late Ito Red, Magenta Gold, and Scarlet Snow peach varieties from the variety-specific minimum size requirements because less than 5,000 containers of each of these varieties was produced during the 2007 season. Peach varieties removed from the peach variety-specific minimum size requirements become subject to the non-listed variety size requirements specified in paragraphs (b) and (c) of § 917.459.

The committees recommended these changes in the minimum size requirements based on a continuing review of the sizing and maturity relationships for these nectarine and peach varieties, and the consumer acceptance levels for various fruit sizes. This rule is designed to establish minimum size requirements for fresh nectarines and peaches consistent with expected crop and market conditions. This should help establish and maintain orderly marketing conditions for these fruits in the interests of producers, handlers, and consumers.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

Industry Information

There are approximately 145 California nectarine and peach handlers subject to regulation under the orders covering nectarines and peaches grown in California, and about 550 producers of these fruits in California. Small agricultural service firms, which include handlers, are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those whose annual receipts are less than $6,500,000. Small agricultural producers are defined by the SBA as those having annual receipts of less than $750,000. A majority of these handlers and producers may be classified as small entities.

The committees' staff has estimated that there are fewer than 30 handlers in the industry who would not be considered small entities. For the 2007 season, the committees' staff estimated that the average handler price received was $9.00 per container or container equivalent of nectarines or peaches. A handler would have to ship at least 722,223 containers to have annual receipts of $6,500,000. Given data on shipments maintained by the committees' staff and the average handler price received during the 2007 season, the committees' staff estimates that small handlers represent approximately 80 percent of all the handlers within the industry.

The committees' staff has also estimated that fewer than 65 producers in the industry would not be considered small entities. For the 2007 season, the committees estimated the average producer price received was $4.50 per container or container equivalent for nectarines and peaches. A producer would have to produce at least 166,667 containers of nectarines and peaches to have annual receipts of $750,000. Given data maintained by the committees' staff and the average producer price received during the 2007 season, the committees' staff estimates that small producers represent more than 88 percent of the producers within the industry.

With an average producer price of $4.50 per container or container equivalent, and a combined packout of nectarines and peaches of 42,382,098 containers, the value of the 2007 packout is estimated to be $190,719,441. Dividing this total estimated grower revenue figure by the estimated number of producers (550) yields an estimate of average revenue per producer of about $346,763 from the sales of peaches and nectarines.

Under authority provided in §§ 916.52 and 917.41 of the orders, grade, size,

maturity, pack, and container marking requirements are established for fresh shipments of California nectarines and peaches, respectively. Such requirements are in effect on a continuing basis.

Sections 916.356 and 917.459 of the orders' rules and regulations establish minimum sizes for various varieties of nectarines and peaches. This rule makes adjustments to the minimum sizes authorized for certain varieties of each commodity for the 2008 season. Minimum size regulations are put in place to encourage producers to leave fruit on the trees for a longer period of time, increasing both maturity and fruit size. Increased fruit size increases the number of packed containers per acre, and coupled with heightened maturity levels, also provides greater consumer satisfaction, which in turn fosters repeat purchases that benefit producers and handlers alike.

Annual adjustments to minimum sizes of nectarines and peaches, such as these, are recommended by the committees based upon historical data, producer and handler information regarding sizes attained by different varieties, and trends in consumer purchases.

An alternative to such action would include not establishing minimum size regulations for these new varieties. Such an action, however, would be a significant departure from the committees' past practices and represent a significant change in the regulations as they currently exist. For these reasons, this alternative was not recommended.

The committees make recommendations regarding the revisions in handling requirements after considering all available information, including comments received by committee staff. At the meetings, the impact of and alternatives to these recommendations are deliberated. The committees consist of individual producers and handlers with many years of experience in the industry who are familiar with industry practices and trends. All committee meetings are open to the public and comments are widely solicited. In addition, minutes of all meetings are distributed to committee members and others who have requested them, and are also available on the committees' Web site, thereby increasing the availability of this critical information within the industry.

Regarding the impact of this action on the affected entities, both large and small entities are expected to benefit from the changes, and the costs of compliance are not expected to be significantly different between large and small entities.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large nectarine and peach handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

Further, the committees' meetings were widely publicized throughout the nectarine and peach industry and all interested parties were invited to attend the meetings and participate in committee deliberations. Like all committee meetings, the December 18, 2007, meetings were public meetings and all entities, both large and small, were able to express their views on this issue.

Also, the committees have a number of appointed subcommittees to review certain issues and make recommendations to the committees. The committees' Tree Fruit Quality Subcommittee met on December 11, 2007, and discussed this issue in detail. Finally, interested persons are invited to submit information on this interim final rule, including the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at the following Web site: *http://www.ams.usda.gov/fv/moab.html*. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on changes to the handling requirements currently prescribed under the marketing orders for California fresh nectarines and peaches. Any comments timely received will be considered prior to finalization of this rule.

After consideration of all relevant material presented, including the committees' recommendation, and other information, it is found that this interim final rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined, upon good cause, that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) This rule should be implemented as soon as possible, since shipments of California nectarines and peaches are expected to begin in early April; (2) the committees met and unanimously recommended these changes at public meetings, and interested persons had opportunities to provide input at all those meetings; and (3) the rule provides a 60-day comment period, and any written comments timely received will be considered prior to any finalization of this interim final rule.

List of Subjects

7 CFR Part 916

Marketing agreements, Nectarines, Reporting and recordkeeping requirements.

7 CFR Part 917

Marketing agreements, Peaches, Pears, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR parts 916 and 917 are amended as follows:

■ 1. The authority citation for 7 CFR parts 916 and 917 continues to read as follows:

Authority: 7 U.S.C. 601–674.

PART 916—NECTARINES GROWN IN CALIFORNIA

■ 2. Section 916.356 is amended by revising the introductory text of paragraphs (a)(3), (a)(4), and (a)(6) to read as follows:

§ 916.356 California nectarine grade and size regulation.

* * * * *

(3) Any package or container of Mayglo variety of nectarines on or after May 6 of each year, or Burnectfive (Spring Flare® 21), Burnectten (Spring Flare® 19), Crimson Baby, Earliglo, Polar Ice, Polar Light, Red Jewel or Zee Fire variety nectarines unless:

* * * * *

(4) Any package or container of Arctic Star, Burnectone (Spring Ray®), Burnecttwelve (Sweet Flair® 21), Burnectthirteen (Snow Flare® 22), Burnectfourteen (Snow Flare® 21), Diamond Bright, Diamond Pearl, Early Pearl, Gee Sweet, June Pearl, Kay Fire, Kay Glo, Kay Sweet, Prima Diamond IV, Prima Diamond VI, Prima Diamond XIII,

Prince Jim, Prince Jim 1, Red Roy, Rose Bright, Rose Diamond, Royal Glo, White Sun, or Zee Grand variety nectarines unless:

* * * * *

(6) Any package or container of Alta Red, Arctic Belle, Arctic Blaze, Arctic Gold, Arctic Ice, Arctic Jay, Arctic Mist, Arctic Pride, Arctic Queen, Arctic Snow (White Jewel), Arctic Sweet, August Bright, August Fire, August Glo, August Lion, August Pearl, August Red, August Sweet, Autumn Blaze, Big Jim, Bright Pearl, Burnectfour (Summer Flare® 35), Burnectseven (Summer Flare® 28), Burnecteleven (Summer Flare® 30), Burnectfifteen (Summer Flare® 27), Burnectseventeen (Summer Flare® 32), Candy Gold, Candy Pearl, Diamond Ray, Early Red Jim, Fire Pearl, Fire Sweet, Flaming Red, Giant Pearl, Grand Bright, Grand Candy, Grand Pearl, Grand Sweet, Honey Blaze, Honey Dew, Honey Diva, Honey Fire, Honey Kist, Honey Royale, July Pearl, July Red, Kay Pearl, La Pinta, La Reina, Larry's Red, Late Red Jim, Mike's Red, P-R Red, Prima Diamond VII, Prima Diamond IX, Prima Diamond X, Prima Diamond XIX, Prima Diamond XXIV, Prima Diamond XXVIII, Prince Jim 3, Red Diamond, Red Glen, Red Jim, Red Pearl, Regal Pearl, Regal Red, Royal Giant, Ruby Diamond, Ruby Pearl, Ruby Sweet, Saucer, September Bright (26P–490), September Free, September Red, Sparkling June, Spring Bright, Spring Pearl™, Spring Sweet, Sugar Pearl™, Sugarine, Summer Blush, Summer Bright, Summer Diamond, Summer Fire, Summer Jewel, Summer Lion, Summer Red, Sunburst, Sun Valley Sweet, Terra White, Zee Glo or Zephyr variety nectarines unless:

* * * * *

PART 917—FRESH PEARS AND PEACHES GROWN IN CALIFORNIA

■ 3. Section 917.459 is amended by revising the introductory text of paragraphs (a)(2), (a)(3), (a)(5) and (a)(6) to read as follows:

§ 917.459 California peach grade and size regulation.

* * * * *

(2) Any package or container of April Snow, Earlitreat, Snow Angel, Supeachsix (91002), Supechfifteen, or Super Lady variety peaches unless:

* * * * *

(3) Any package or container of Island Prince, Snow Kist, Snow Peak or Super Rich variety peaches unless:

* * * * *

(5) Any package or container of Babcock, Bev's Red, Bright Princess, Brittney Lane, Burpeachone (Spring Flame® 21), Burpeachfourteen (Spring Flame® 20), Burpeachnineteen (Spring Flame® 22), Candy Red, Crimson Lady, Crimson Queen, Crown Princess, David Sun, Early May Crest, Flavorcrest, Honey Sweet, Ivory Queen, June Lady, Magenta Queen, May Crest, May Sweet, Prima Peach IV, Queencrest, Rich May, Sauzee Queen, Scarlet Queen, Sierra Snow, Snow Brite, Springcrest, Spring Lady, Spring Snow, Springtreat (60EF32), Sugar Time (214LC68), Supecheight (012–094), Supechnine, Sweet Scarlet, Sweet Crest or Zee Diamond variety peaches unless:

* * * * *

(6) Any package or container of August Lady, Autumn Flame, Autumn Red, Autumn Rich, Autumn Rose, Autumn Snow, Burpeachtwo (Henry II®), Burpeachthree (September Flame®), Burpeachfour (August Flame®), Burpeachfive (July Flame®), Burpeachsix (June Flame®), Burpeachseven (Summer Flame® 29), Burpeachfifteen (Summer Flame® 34), Burpeachsixteen, Burpeachtwenty (Summer Flame®), Burpeachtwentyone (Summer Flame® 26), Candy Princess, Coral Princess, Country Sweet, Diamond Princess, Earlirich, Early Elegant Lady, Elegant Lady, Fancy Lady, Fay Elberta, Full Moon, Galaxy, Glacier White, Henry III, Henry IV, Ice Princess, Ivory Princess, Jasper Flame, Jasper Treasure, Jillie White, Joanna Sweet, John Henry, Kaweah, Klondike, Last Tango, Natures #10, O'Henry, Peach-N-Cream, Pink Giant, Pink Moon, Prima Gattie 8, Prima Peach 13, Prima Peach XV, Prima Peach 20, Prima Peach 23, Prima Peach XXVII, Princess Gayle, Queen Jewel, Rich Lady, Royal Lady, Ruby Queen, Ryan Sun, Saturn (Donut), September Blaze, September Snow, September Sun, Sierra Gem, Sierra Rich, Snow Beauty, Snow Blaze, Snow Fall, Snow Gem, Snow Giant, Snow Jewel, Snow King, Snow Magic, Snow Princess, Sprague Last Chance, Spring Candy, Strawberry, Sugar Crisp, Sugar Giant, Sugar Lady, Summer Dragon, Summer Fling, Summer Lady, Summer Sweet, Summer Zee, Sweet Blaze, Sweet Dream, Sweet Henry, Sweet Kay, Sweet September, Tra Zee, Valley Sweet, Vista, White Lady, or Zee Lady variety peaches unless:

* * * * *

Dated: March 12, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–5357 Filed 3–17–08; 8:45 am]

BILLING CODE 3410–02–P

NUCLEAR REGULATORY COMMISSION

10 CFR Chapter I

RIN 3150–AH84

Expanded Definition of Byproduct Material; Notification of Impending Waiver Termination

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of impending waiver termination.

SUMMARY: Section 651(e) of the Energy Policy Act of 2005 (EPAct) authorized the U.S. Nuclear Regulatory Commission (Commission or NRC) to issue a time-limited waiver (70 FR 51581; August 31, 2005) to allow continued use and possession of naturally-occurring and accelerator-produced radioactive materials (NARM) while the Commission developed a regulatory framework for regulation of the new byproduct material. The Commission has begun terminating the time-limited waiver in phases in accordance to the provisions of the ''Plan for the Transition of Regulatory Authority Resulting from the Expanded Definition of Byproduct Material'' (transition plan) issued by the Commission on October 19, 2007 (72 FR 59157). The first phase of waiver terminations occurred on November 30, 2007.

This document provides advance notification that on September 30, 2008, the Commission will terminate the time-limited waivers for the following non-Agreement States and remaining U.S. Territories that have been included in Phase 2.

Guam, Idaho, Missouri, South Dakota, Vermont, West Virginia, and all territories and possessions of the U.S. that were not identified as part of the first phase of waiver terminations.

As provided in the transition plan, users of NARM in non-Agreement States and U.S. Territories will be required to (1) apply for license amendments for the new byproduct material within 6 months from the date the waiver is terminated, if they hold an NRC specific byproduct materials license; or (2) submit a license application for the new byproduct material within 12 months from the date the waiver is terminated for their State or territory.

FOR FURTHER INFORMATION CONTACT: Kim K. Lukes, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–6701 or e-mail *KXK2@NRC.GOV.*

Dated at Rockville, Maryland, this 12th day of March, 2008.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. E8–5390 Filed 3–17–08; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–29092; Directorate Identifier 2007–NE–30–AD; Amendment 39–15431; AD 2008–06–19]

RIN 2120–AA64

Airworthiness Directives; Honeywell International Inc. ATF3–6 and ATF3–6A Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for Honeywell International Inc. ATF3–6 and ATF3–6A series turbofan engines equipped with a certain part number (P/N) low pressure compressor (LPC) aft shaft. This AD requires removing from service those LPC aft shafts and installing a serviceable LPC aft shaft. This AD results from reports of eight LPC aft shafts found cracked during fluorescent penetrant inspection (FPI). We are issuing this AD to prevent uncoupling and overspeed of the low pressure turbine, which could result in uncontained engine failure and damage to the airplane.

DATES: This AD becomes effective April 22, 2008.

ADDRESSES: You can get the service information identified in this AD from Honeywell International Inc., 111 S. 34th St., Phoenix, AZ 85034–2802; Web site: *http://portal.honeywell.com/wps/portal/aero;* telephone (800) 601–3099.

The Docket Operations office is located at Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

FOR FURTHER INFORMATION CONTACT: Joseph Costa, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; e-mail: *joseph.costa@faa.gov;* telephone: (562) 627–5246; fax: (562) 627–5210.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR part 39 with a proposed AD. The proposed AD applies to Honeywell International Inc. ATF3–6 and ATF3–6A series turbofan engines equipped with a certain part numbered LPC aft shaft. We published the proposed AD in the **Federal Register** on October 5, 2007 (72 FR 56945). That action proposed to require removing LPC aft shafts, P/N 3002070–1, from service and installing serviceable LPC aft shafts.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

Comments

We provided the public the opportunity to participate in the development of this AD. We received no comments on the proposal or on the determination of the cost to the public.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

We estimate that this AD will affect 32 ATF3–6 and ATF3–6A series turbofan engines installed on airplanes of U.S. registry. We also estimate that it will take about 40 work-hours per engine to perform the actions if unscheduled, 20 work-hours per engine if during scheduled major periodic inspection (MPI), and 1 work-hour per engine during scheduled core zone inspection (CZI). We estimate that four engines would be unscheduled, 14 engines would be scheduled at MPI, and 14 engines would be scheduled at CZI. The average labor rate is $80 per work-hour. Required parts would cost about $15,000 per engine. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $516,320.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary at the address listed under **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

2008–06–19 Honeywell International Inc. (formerly AlliedSignal Inc. and Garrett Turbine Engine Co.): Amendment 39–15431. Docket No. FAA–2007–29092; Directorate Identifier 2007–NE–30–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective April 22, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Honeywell International Inc. ATF3–6–4C, ATF3–6A–3C, and ATF3–6A–4C turbofan engines equipped with part number (P/N) 3002070–1 low pressure compressor (LPC) Aft shaft. These engines are installed on, but not limited to, Dassault Aviation Fan Jet Falcon Series G (Falcon 20G/HU25), and Dassault Aviation Mystere-Falcon 200 airplanes.

Unsafe Condition

(d) This AD results from reports of eight LPC aft shafts found cracked during fluorescent penetrant inspection (FPI). We are issuing this AD to prevent uncoupling and overspeed of the low pressure turbine, which could result in uncontained engine failure and damage to the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified in Table 1 and Table 2 of this AD, unless the actions have already been done.

TABLE 1.—ATF3–6A–4C TURBOFAN ENGINES, LPC AFT SHAFT REPLACEMENT COMPLIANCE SCHEDULE

For ATF3–6A–4C turbofan engines, if the cycles-since-new (CSN) on the effective date of this AD are:	Then replace the LPC Aft shaft:
(1) 6,500 or more CSN	Within an additional 100 cycles-in-service (CIS).
(2) 5,000 to 6,499 CSN	Within an additional 800 CIS, but not more than 6,600 CSN, whichever occurs first.
(3) 4,000 to 4,999 CSN	Within an additional 1,500 CIS, but not more than 5,800 CSN, whichever occurs first.
(4) Fewer than 4,000 CSN	Within an additional 2,000 CIS, but not more than 5,500 CSN, whichever occurs first.

TABLE 2.—ATF3–6–4C AND ATF3–6A–3C TURBOFAN ENGINES, LPC AFT SHAFT REPLACEMENT COMPLIANCE SCHEDULE

For ATF3–6–4C and ATF3–6A–3C turbofan engines, if the CSN on the effective date of this AD are:	Then replace the LPC Aft shaft:
(1) 4,400 or more CSN	Within an additional 100 CIS.
(2) 3,600 to 4,399 CSN	Within an additional 500 CIS, but not more than 4,500 CSN, whichever occurs first.
(3) 3,300 to 3,599 CSN	Within an additional 700 CIS, but not more than 4,100 CSN, whichever occurs first.
(4) Fewer than 3,300 CSN	Within an additional 1,000 CIS, but not more than 4,000 CSN, whichever occurs first.

LPC Aft Shaft Replacement

(f) Using the compliance schedule in Table 1 or Table 2 of this AD as applicable, remove the LPC aft shaft, P/N 3002070–1, from service, and install a serviceable LPC aft shaft.

Definition

(g) For the purpose of this AD, a serviceable LPC aft shaft is an aft shaft with a P/N not referenced in this AD.

Alternative Methods of Compliance

(h) The Manager, Los Angeles Aircraft Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(i) Honeywell International Inc. Service Bulletin No. ATF3–72–6240, Revision 1, dated May 14, 2007, pertains to the subject of this AD.

(j) Contact Joseph Costa, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood CA 90712–4137; e-mail: *joseph.costa@faa.gov;* telephone: (562) 627–5246; fax: (562) 627–5210, for more information about this AD.

Material Incorporated by Reference

(k) None.

Issued in Burlington, Massachusetts, on March 10, 2008.

Robert J. Ganley,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. E8–5274 Filed 3–17–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–0216; Directorate Identifier 2007–NM–122–AD; Amendment 39–15435; AD 2008–06–23]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–8–55, DC–8F–54, and DC–8F–55 Airplanes; and Model DC–8–60, DC–8–70, DC–8–60F, and DC–8–70F Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD) that applies to certain McDonnell Douglas Model DC–8–55, DC–8F–54, and DC–8F–55 airplanes; and Model DC–8–60, DC–8–70, DC–8–60F, and DC–8–70F series airplanes. The existing AD currently requires a one-time inspection for previous repairs of the aft fuselage skin panel at the longeron 28 skin splice, repetitive inspections for cracks of the same area, and related investigative and corrective actions. The existing AD also provides optional actions for extending the repetitive inspection intervals. This new AD re-defines and more clearly describes the optional actions for extending the repetitive inspection intervals. This AD results from our determination that the inspections and actions described in the existing AD do not adequately address the unsafe condition. We are issuing this AD to detect and correct cracks in the aft fuselage skin at the longeron 28 skin splice, which could lead to loss of structural integrity of the aft fuselage, resulting in rapid decompression of the airplane.

DATES: This AD becomes effective April 22, 2008.

The incorporation by reference of certain publications listed in the AD was approved previously by the Director

of the Federal Register as of February 28, 2007 (72 FR 3044, January 24, 2007).

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024).

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Jon Mowery, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5322; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that supersedes AD 2007–02–02, amendment 39–14889 (72 FR 3044, January 24, 2007). The existing AD applies to certain McDonnell Douglas Model DC–8–55, DC–8F–54, and DC–8F–55 airplanes; and Model DC–8–60, DC–8–70, DC–8–60F, and DC–8–70F series airplanes. That NPRM was published in the **Federal Register** on November 21, 2007 (72 FR 65471). That NPRM proposed to continue to require a one-time inspection for previous repairs of the aft fuselage skin panel at the longeron 28 skin splice, repetitive inspections for cracking of the same area, and related investigative and corrective actions. That NPRM also proposed to re-define and more clearly describe the optional actions for extending the repetitive inspection intervals.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comment that was received on the NPRM.

Request To Give Credit for Prior Submission of Inspection Findings

UPS agrees with the intent of the NPRM. UPS requests, however, that we revise paragraphs (k)(1) and (k)(2) of the NPRM to specify submitting positive findings ''unless previously submitted to Boeing for compliance with AD 2007–02–02.'' UPS asserts that this would allow all alternative methods of compliance (AMOCs) that apply to AD 2007–02–02 to be applicable to this new AD ''as per paragraph (k)(4) [*sic*].'' UPS states that this will prevent operators from having to submit data already submitted previously for AD 2007–02–02, and again requesting AMOC approval.

We do not agree with this request. Operators are always given credit for work previously performed according to the existing AD by means of the phrase in the compliance paragraph of this AD that states, ''Required * * * unless the actions have already been done.'' In addition, paragraph (l)(4) of this AD (rather than paragraph (k)(4) as specified by the commenter) states that AMOCs approved for compliance with AD 2007–02–02 are acceptable for compliance with the corresponding provisions of this AD. For these reasons, no change is needed to the AD in this regard.

Conclusion

We have carefully reviewed the available data, including the comment that has been received, and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

There are approximately 508 airplanes of the affected design in the worldwide fleet. The FAA estimates that 244 airplanes of U.S. registry are affected by this AD. The average labor rate is $80 per work hour. This AD adds no additional costs; however, we are repeating the costs from AD 2007–02–02 for the convenience of affected operators.

ESTIMATED COSTS

Action	Work hours	Cost per airplane	Fleet cost
Initial inspection for doubler installation	2 to 4	$160 to $320	$39,040 to $78,080.
Repetitive inspections (per inspection cycle)	2 to 8	$160 to $640	$39,040 to $156,160.
Repair	164 to 184	$13,120 to $14,720	$3,201,280 to $3,591,680.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–14889 (72 FR 3044, January 24, 2007) and by adding the following new airworthiness directive (AD):

2008–06–23 McDonnell Douglas: Amendment 39–15435. Docket No. FAA–2007–0216; Directorate Identifier 2007–NM–122–AD.

Effective Date

(a) This AD becomes effective April 22, 2008.

Affected ADs

(b) This AD supersedes AD 2007–02–02.

Applicability

(c) This AD applies to McDonnell Douglas Model DC–8–55, DC–8F–54, DC–8F–55, DC–8–61, DC–8–62, DC–8–63, DC–8–61F, DC–8–62F, DC–8–63F, DC–8–71, DC–8–72, DC–8–73, DC–8–71F, DC–8–72F, and DC–8–73F airplanes, certificated in any category; as identified in Boeing Alert Service Bulletin DC8–53A080, dated June 22, 2004.

Unsafe Condition

(d) This AD results from our determination that the inspections and actions described in the existing AD do not adequately address the unsafe condition. We are issuing this AD to detect and correct cracks in the aft fuselage skin at the longeron 28 skin splice, which could lead to loss of structural integrity of the aft fuselage, resulting in rapid decompression of the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Requirements of AD 2007–02–02

One-Time Inspection for Previous Repairs

(f) For all airplanes: At the applicable time in paragraph (f)(1) or (f)(2) of this AD, do a general visual inspection to determine if there are previous repairs of the aft fuselage skin panel at the longeron 28 skin splice; in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin DC8–53A080, dated June 22, 2004. Then do the applicable actions specified in paragraphs (g) and (h) of this AD.

(1) For airplanes that have accumulated fewer than 24,000 total flight cycles as of February 28, 2007 (the effective date of AD 2007–02–02): Within 24 months after February 28, 2007, or prior to accumulating 24,000 total flight cycles, whichever occurs later.

(2) For airplanes that have accumulated 24,000 total flight cycles or more as of February 28, 2007: Within 12 months after February 28, 2007.

Note 1: For the purposes of this AD, a general visual inspection is: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

Repetitive Inspections for Areas That Do Not Have a Previous Repair

(g) For areas that do not have a previous repair: Before further flight after the initial inspection in paragraph (f) of this AD, do general visual and high-frequency eddy current (HFEC) inspections for discrepancies at longeron 28 between the bolted connection of the tail section to forward of the flat aft pressure bulkhead, on both the left and right sides, and do all applicable related investigative and corrective actions before further flight. Do all actions in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin DC8–53A080, dated June 22, 2004. Repeat the general visual and HFEC inspections thereafter at intervals not to exceed 2,000 flight cycles until an optional action in paragraph (i) of this AD is accomplished.

Repetitive Inspections and Repair for Areas That Have a Previous Repair

(h) For areas that have a previous repair: Within 24 months after accomplishing the initial inspection in paragraph (f) of this AD, remove the previous repair(s), and install a local repair, in accordance with Boeing DC–8 Service Rework Drawing SR08530032, dated January 13, 2004, including Boeing Parts List PL SR08530032, dated January 7, 2004, Boeing Advance Engineering Order, Advanced Drawing Change A, dated April 1, 2004, and Boeing Engineering Order, dated January 13, 2004. Do the inspections in paragraph (j) of this AD thereafter at the applicable interval specified in paragraph (j)(1) or (j)(2) of this AD.

New Requirements of This AD

Optional Modification/Repair

(i) Installing a full-length preventive modification, doing a full-length repair, or doing a local repair, in accordance with Boeing DC–8 Service Rework Drawing SR08530032, dated January 13, 2004, including Boeing Parts List PL SR08530032, dated January 7, 2004; Boeing Advance Engineering Order, Advanced Drawing Change A, dated April 1, 2004; and Boeing Engineering Order, dated January 13, 2004; ends the repetitive inspection intervals specified in paragraph (g) of this AD.

Extended Repetitive Inspection Intervals

(j) After removing the previous repair(s) and doing the actions specified in paragraph (h) of this AD or doing any optional repair or modification described in paragraph (i) of this AD: Do the actions described in paragraph (j)(1) or (j)(2) of this AD as applicable, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin DC8–53A080, dated June 22, 2004. If any discrepancy is discovered during any inspection required by this paragraph, before further flight, repair the discrepancy using a method approved in accordance with the procedures specified in paragraph (l) of this AD.

(1) For areas that have been repaired on airplanes that do have internal finger doublers installed: Within 30,000 flight cycles after doing the optional repair or modification, do a general visual inspection for discrepancies along all four external edges of the doublers. Repeat the inspection thereafter at intervals not to exceed 5,000 flight cycles.

(2) For areas that have been repaired on airplanes that do not have internal finger doublers installed: Do the actions specified in paragraph (j)(2)(i) or (j)(2)(ii) of this AD, as applicable.

(i) For any repair that is 12 inches or less along the longeron: Within 15,000 flight cycles after removing the previous repair(s) and doing the actions specified in paragraph (h) of this AD or doing any optional repair or modification specified in paragraph (i) of this AD, do a general visual inspection for discrepancies along all four external edges of the doublers. Repeat the general visual inspection thereafter at intervals not to exceed 5,000 flight cycles.

(ii) For any repair that is greater than 12 inches in length along the longeron: Within 15,000 flight cycles after removing the previous repair(s) and doing the actions specified in paragraph (h) of this AD or doing any optional repair or modification specified in paragraph (i) of this AD, do a low-frequency eddy current (LFEC) inspection for discrepancies along all four external edges of the doublers. Repeat the LFEC inspection thereafter at intervals not to exceed 10,000 flight cycles.

Reporting of Results

(k) Submit a report of positive findings of the inspections required by paragraphs (g) and (j) of this AD to Boeing Commercial Airplanes, Manager, Structure/Payloads, Technical and Fleet Support, Service Engineering/Commercial Aviation Services, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, at the applicable time specified in paragraph (k)(1) or (k)(2) of this AD. The report must include the inspection results, a description of any discrepancies found, the airplane

fuselage number, and the total number of landings and flight hours on the airplane. Information collection requirements contained in this AD have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) and have been assigned OMB Control Number 2120–0056.

(1) For any inspection accomplished after the effective date of this AD: Submit the report within 30 days after performing the inspection.

(2) For any inspection accomplished prior to the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

Alternative Methods of Compliance (AMOCs)

(l)(1) The Manager, Los Angeles Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Los Angeles ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane and 14 CFR 25.571, Amendment 45, and the approval must specifically refer to this AD.

(4) AMOCs approved previously in accordance with AD 2007–02–02, are approved as AMOCs for the corresponding provisions of this AD.

Material Incorporated by Reference

(m) You must use Boeing Alert Service Bulletin DC8–53A080, dated June 22, 2004; and Boeing DC–8 Service Rework Drawing SR08530032, dated January 13, 2004, including Boeing Parts List PL SR08530032, dated January 7, 2004, Boeing Advance Engineering Order, Advanced Drawing Change A, dated April 1, 2004, and Boeing Engineering Order, dated January 13, 2004; as applicable, to perform the actions that are required by this AD, unless the AD specifies otherwise.

(1) On February 28, 2007 (72 FR 3044, January 24, 2007), the Director of the Federal Register approved the incorporation by reference of these documents.

(2) Contact Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024), for a copy of this service information. You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on March 9, 2008.

Stephen P. Boyd,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–5295 Filed 3–17–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 95

[Docket No. 30599; Amdt. No. 473]

IFR Altitudes; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts miscellaneous amendments to the required IFR (instrument flight rules) altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. This regulatory action is needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

DATES: *Effective Date:* 0901 UTC, April 10, 2008.

FOR FURTHER INFORMATION CONTACT: Donald P. Pate, Flight Procedure Standards Branch (AMCAFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to part 95 of the Federal Aviation Regulations (14 CFR part 95) amends, suspends, or revokes IFR altitudes governing the operation of all aircraft in flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in part 95.

The Rule

The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference. The reasons and circumstances that create the need for this amendment involve matters of flight safety and operational efficiency in the National Airspace System, are related to published aeronautical charts that are essential to the user, and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next scheduled charting and publication date of the flight information to assure its timely availability to the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment are impracticable and contrary to the public interest and that good cause exists for making the amendment effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 95

Airspace, Navigation (air).

Issued in Washington, DC on March 11, 2008.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me by the Administrator, part 95 of the Federal Aviation Regulations (14 CFR part 95) is amended as follows effective at 0901 UTC, April 10, 2008.

■ 1. The authority citation for part 95 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44719, 44721.

■ 2. Part 95 is amended as follows:

REVISIONS TO IFR ALTITUDES & CHANGEOVER POINTS

[Amendment 473 effective date April 10, 2008]

From	To	MEA
§ 95.6001 Victor Routes—U.S.		
§ 95.6001 VOR Federal Airway V1 Is Amended To Read in Part		
Salisbury, MD VORTAC *1500—MOCA	Waterloo, DE VOR/DME	*2000
§ 95.6006 VOR Federal Airway V6 Is Amended To Read in Part		
Selinsgrove, PA VORTAC *3500—MOCA *4000—GNSS MEA	Snowy, PA FIX	*5000
Snowy, PA FIX *3300—MOCA	Allentown, PA VORTAC	*4000
§ 95.6008 VOR Federal Airway V8 Is Amended To Read in Part		
Matzo, UT FIX	Bryce Canyon, UT VORTAC	12300
§ 95.6016 VOR Federal Airway V16 Is Amended To Read in Part		
Tappa, VA FIX *1500—MOCA *2000—GNSS MEA	Colin, VA FIX	*5000
Colin, VA FIX *1400—MOCA *2000—GNSS MEA	Patuxent, MD VORTAC	*5000
§ 95.6020 VOR Federal Airway V20 Is Amended To Read in Part		
Tappa, VA FIX *1500—MOCA *2000—GNSS MEA	Colin, VA FIX	*5000
Colin, VA FIX *1800—MOCA *2000—GNSS MEA	Nottingham, MD VORTAC	*10000
§ 95.6025 VOR Federal Airway V25 Is Amended To Read in Part		
Los Angeles, CA VORTAC *3000—MRA	*Merma, CA FIX	2000
*Merma, CA FIX *3000—MRA	Exert, CA FIX	2000
§ 95.6031 VOR Federal Airway V31 Is Amended To Read in Part		
Vinny, PA FIX *4500—MRA **5000—GNSS MEA	*Suede, PA FIX	**12000
Suede, PA FIX **5000—GNSS MEA	Gramo, PA FIX	**12000
Gramo, PA FIX *5000—GNSS MEA	Harrisburg, PA VORTAC	*7000
§ 95.6033 VOR Federal Airway V33 Is Amended To Read in Part		
Colin, VA FIX *1800—MOCA *2000—GNSS MEA	Nottingham, MD VORTAC	*10000
Vinny, PA FIX *4500—MRA **5000—GNSS MEA	*Suede, PA FIX	**12000
Suede, PA FIX **5000—GNSS MEA	Gramo, PA FIX	**12000
Gramo, PA FIX *5000—GNSS MEA	Harrisburg, PA VORTAC	*7000

REVISIONS TO IFR ALTITUDES & CHANGEOVER POINTS—Continued

[Amendment 473 effective date April 10, 2008]

From	To	MEA
§ 95.6058 VOR Federal Airway V58 Is Amended To Read in Part		
*Eared, PA FIX *4000—MRA **4100—MOCA **5000—GNSS MEA	Philipsburg, PA VORTAC	**6000
§ 95.6063 VOR Federal Airway V63 Is Amended To Read in Part		
Wausau, WI VORTAC *3500—MOCA #USE AUW 005 RHI 185 UNUSABLE.	Rhinelander, WI VORTAC	#*4000
§ 95.6091 VOR Federal Airway V91 Is Amended To Read in Part		
Albany, NY VORTAC *5000—GNSS MEA	Glens Falls, NY VORTAC	*7000
Glens Falls, NY VORTAC *5000—GNSS MEA	Enson, VT FIX	*10000
§ 95.6099 VOR Federal Airway V99 Is Amended To Read in Part		
Outte, CT FIX *4000—GNSS MEA	Sorry, CT FIX	*10000
§ 95.6106 VOR Federal Airway V106 Is Amended To Read in Part		
Raymy, NH FIX *2200—MOCA *3000—GNSS MEA	Kennebunk, ME VORTAC	*5500
§ 95.6130 VOR Federal Airway V130 Is Amended To Read in Part		
Albany, NY VORTAC *3900—MOCA *4000—GNSS MEA	Stela, MA FIX	*6000
Stela, MA FIX	Bradley, CT VORTAC	3900
Bradley, CT VORTAC	Norwich, CT VOR/DME	2600
§ 95.6146 VOR Federal Airway V146 Is Amended To Read in Part		
Albany, NY VORTAC	Chester, MA VOR/DME	4100
§ 95.6157 VOR Federal Airway V157 Is Amended To Read in Part		
Tappa, VA FIX *1500—MOCA *2000—GNSS MEA	Colin, VA FIX	*5000
Colin, VA FIX *1400—MOCA *2000—GNSS MEA	Patuxent, MD VORTAC	*5000
§ 95.6165 VOR Federal Airway V165 Is Amended To Read in Part		
Los Angeles, CA VORTAC *5600—MCA VALEY, CA FIX, N BND	*Valey, CA FIX	4000
§ 95.6210 VOR Federal Airway V210 Is Amended To Read in Part		
Lancaster, PA VORTAC	Spery, PA FIX	2800
Spery, PA FIX *2200—MOCA	Yardley, PA VOR/DME	*3000
§ 95.6213 VOR Federal Airway V213 Is Amended To Read in Part		
Tappa, VA FIX *1500—MOCA *2000—GNSS MEA	Colin, VA FIX	*5000
Colin, VA FIX *1400—MOCA *2000—GNSS MEA	Patuxent, MD VORTAC	*5000

REVISIONS TO IFR ALTITUDES & CHANGEOVER POINTS—Continued

[Amendment 473 effective date April 10, 2008]

From	To	MEA
§ 95.6489 VOR Federal Airway V489 Is Amended To Read in Part		
Albany, NY VORTAC *5000—GNSS MEA	Glens Falls, NY VORTAC	*7000
Glens Falls, NY VORTAC *8000—MRA	*Fairb, NY FIX	6000
*Fairb, NY FIX *8000—MRA **6000—GNSS MEA	Leafy, NY FIX	**8000

From	To	MEA	MAA
§ 95.7001 Jet Routes **§ 95.7029 Jet Route J29 Is Amended To Read in Part**			
Humble, TX VORTAC	El Dorado, AR VORTAC	18000	45000
§ 95.7101 Jet Route J101 Is Amended To Read in Part			
Lufkin, TX VORTAC	Little Rock, AR VORTAC	18300	45000

Airway segment		Changeover points	
From	To	Distance	From
§ 95.8003 VOR Federal Airway Changeover Points			
Is Amended To Delete Changeover Point V59: Beckley, WV VORTAC	Pulaski, VA VORTAC	46	Beckley
Is Amended To Add Changeover Point V59: Beckley, WV VORTAC	Parkersburg, WV VORTAC	46	Beckley

[FR Doc. E8–5372 Filed 3–17–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 510 and 522

New Animal Drugs; Change of Sponsor's Name; Iron Injection; Technical Amendment

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendment.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor's name from Animal Health Pharmaceuticals, LLC, to Pharmacosmos, Inc.

DATES: This rule is effective March 18, 2008.

FOR FURTHER INFORMATION CONTACT: David R. Newkirk, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8307, e-mail: *david.newkirk@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Animal Health Pharmaceuticals, LLC, 1805 Oak Ridge Circle, suite 101, St. Joseph, MO 64506, has informed FDA that it has transferred ownership of, and all rights and interest in, NADA 106–772 for Iron-GARD Injection 100 milligrams per milliliter (mg/mL) and NADA 134–708 for Iron-GARD Injection 200 mg/mL to Pharmacosmos, Inc., 776 Mountain Blvd., Watchung, NJ 07069. Accordingly, the regulations are amended in 21 CFR 522.1182 to reflect these changes of sponsorship.

In addition, Pharmacosmos, Inc., is not currently listed in the animal drug regulations as a sponsor of an approved application. Accordingly, 21 CFR 510.600(c) is being amended to add entries for Pharmacosmos, Inc.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects

21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 522

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 510 and 522 are amended as follows:

PART 510—NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 510 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 379e.

■ 2. In § 510.600, in the table in paragraph (c)(1) alphabetically add a new entry for ''Pharmacosmos, Inc.''; and in the table in paragraph (c)(2) numerically add a new entry for ''042552'' to read as follows:

§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.

* * * * *

(c) * * *

(1) * * *

Firm name and address	Drug labeler code
* * * * *	

Firm name and address	Drug labeler code
Pharmacosmos, Inc., 776 Mountain Blvd.,Watchung, NJ 07069.	042552
* * * * *	

(2) * * *

Drug labeler code	Firm name and address
* * * * *	
042552	Pharmacosmos, Inc., 776 Mountain Blvd.,Watchung, NJ 07069
* * * * *	

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 3. The authority citation for 21 CFR part 522 continues to read as follows:

Authority: 21 U.S.C. 360b.

§ 522.1182 [Amended]

■ 4. In § 522.1182, in paragraphs (b)(1) and (b)(7) remove ''059130 and 068718'' and add in its place ''042552 and 059130''.

Dated: March 6, 2008.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. E8–5452 Filed 3–17–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs for Use in Animal Feed; Zilpaterol

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Intervet, Inc. The NADA provides for use of approved, single-ingredient zilpaterol hydrochloride and monensin U.S.P. Type A medicated articles to make two-way combination Type B and Type C medicated feeds for cattle fed in confinement for slaughter.

DATES: This rule is effective March 18, 2008.

FOR FURTHER INFORMATION CONTACT: Gerald L. Rushin, Center for Veterinary Medicine (HFV–126), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8103, e-mail: *gerald.rushin@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Intervet, Inc., P.O. Box 318, 29160 Intervet Lane, Millsboro, DE 19966, filed NADA 141–278 that provides for use of ZILMAX (zilpaterol hydrochloride) and RUMENSIN (monensin U.S.P.) Type A medicated articles to make dry and liquid, two-way combination Type B and Type C medicated feeds used for increased rate of weight gain, improved feed efficiency, and increased carcass leanness; and for prevention and control of coccidiosis due to *Eimeria bovis* and *E. zuernii* in cattle fed in confinement for slaughter during the last 20 to 40 days on feed. The NADA is approved as of February 15, 2008, and the regulations in 21 CFR 558.665 are amended to reflect the approval.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.33(a)(2) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 1. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

■ 2. In § 558.665, add paragraph (e)(3) to read as follows:

§ 558.665 Zilpaterol.

* * * * *

(e) * * *

Zilpaterol in grams/ton	Combination in grams/ton	Indications for use	Limitations	Sponsor
*	*	* *	* *	*
(3) 6.8 to provide 60 to 90 mg/head/day	Monensin 10 to 40	Cattle fed in confinement for slaughter: As in paragraph (e)(1) of this section; and for prevention and control of coccidiosis due to *Eimeria bovis* and *E. zuernii*.	As in paragraph (e)(1) of this section; see paragraph § 558.355(d) of this chapter. Monensin as provided by No. 000986 in § 510.600(c) of this chapter.	057926
*	*	* *	* *	*

Dated: March 6, 2008.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. E8–5450 Filed 3–17–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9377]

RIN 1545–BF02

Application of Section 338 to Insurance Companies; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

SUMMARY: This document contains a correction to final regulations (TD 9377) that were published in the **Federal Register** on Wednesday, January 23, 2008 (73 FR 3868), that apply to a section 197 intangible resulting from an assumption reinsurance transaction, and under section 338 that apply to reserve increases after a deemed asset sale.

DATES: This correction is effective on March 18, 2008.

FOR FURTHER INFORMATION CONTACT: William T. Sullivan (202) 622–7052 (not toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (TD 9377) that is the subject of this correction is under section 197 of the Internal Revenue Code.

Need for Correction

As published, TD 9377 contains an error that may prove to be misleading and is in need of clarification.

List of Subjects 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

■ Accordingly, 26 CFR part 1 is corrected by making the following correcting amendment:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read as follows:

Authority: 26 U.S.C. 7805. * * *

§ 1.1060–1 [Corrected]

■ **Par. 2.** Section 1.1060–1(a)(2)(iii) introductory text, last sentence is amended by removing the language ''§§ 1.338–11 and 1.338–11T(d)'' and adding the language ''§ 1.338–11'' in its place.

Cynthia Grigsby,

Senior Federal Register Liaison Officer, Publications and Regulations Branch, Legal Processing Division, Office of Associate Chief Counsel, (Procedure and Administration).

[FR Doc. E8–5333 Filed 3–17–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9273]

RIN 1545–AX65

Stock Transfer Rules: Carryover of Earnings and Taxes

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to final regulations.

SUMMARY: This document contains a correction to final regulations (TD 9273) that were published in the **Federal Register** on Tuesday, August 8, 2006 (71 FR 44887) addressing the carryover of certain tax attributes, such as earnings and profits and foreign income tax accounts, when two corporations combine in a corporate reorganization or liquidation that is described in both sections 367(b) and 381 of the Internal Revenue Code.

DATES: This correction is effective March 18, 2008.

FOR FURTHER INFORMATION CONTACT: Jeffrey L. Parry at (202) 622–3050 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (TD 9273) that are the subject of this correction are under section 367(b) of the Internal Revenue Code.

Need for Correction

As published, final regulations (TD 9273) contain errors that may prove to be misleading and are in need of clarification.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

■ Accordingly, 26 CFR part 1 is corrected by making the following correcting amendment:

PART 1—INCOME TAXES

■ **Paragraph 1**. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805. * * *

■ **Par. 2**. Section 1.367(b)–6 is amended by revising paragraph (a)(1) to read as follows:

§ 1.367(b)–6 Effective dates and coordination rules.

(a) *Effective date.* (1) *In general.* Except as otherwise provided in this paragraph (a)(1), §§ 1.367(b)–1 through 1.367(b)–5, and this section, apply to section 367(b) exchanges that occur on or after February 23, 2000. The rules of §§ 1.367(b)–3 and 1.367(b)–4, as they apply to reorganizations described in section 368(a)(1)(A) (including reorganizations described in section 368(a)(2)(D) or (E)) involving a foreign acquiring or foreign acquired corporation, apply only to transfers occurring on or after January 23, 2006. Section 1.367(b)–4(b)(1)(ii) applies to all triangular reorganizations and reorganizations described in section 368(a)(1)(G) and (a)(2)(D) occurring on or after January 23, 2006, although taxpayers may apply § 1.367(b)–4(b)(1)(ii) to triangular B reorganizations occurring on or after February 23, 2000, in a taxable year that is not closed by the period of limitations if done consistently with respect to all such triangular B reorganizations. The second sentence of paragraph (a) in § 1.367(b)–4 shall apply to section 304(a)(1) transactions occurring on or after February 23, 2006; however, taxpayers may rely on this sentence for all section 304(a)(1) transactions occurring in open taxable years. Section 1.367(b)–1(c)(2)(v), (c)(3)(ii)(A), (c)(4)(iv), (c)(4)(v), 1.367(b)–2(j)(1)(i), (l), and 1.367(b)–3(e) and (f), apply to section 367(b) exchanges that occur on or after November 6, 2006. For guidance with respect to § 1.367(b)–1(c)(3)(ii)(A) and (c)(4)(iv) and (v) and § 1.367(b)–2(j)(1)(i) for exchanges that occur before November 6, 2006, see 26 CFR part 1 revised as of April 1, 2006.

* * * * *

La Nita VanDyke,

Branch Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. E8–5334 Filed 3–17–08; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2008–0069; A–1–FRL–8543–4]

Approval and Promulgation of Air Quality Implementation Plans; New Hampshire; Determination of Attainment of the Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is determining that the Boston-Manchester-Portsmouth (SE), New Hampshire moderate 8-hour ozone nonattainment area has attained the 8-hour National Ambient Air Quality Standard (NAAQS) for ozone. This determination is based upon certified ambient air monitoring data that show the area has monitored attainment of the 8-hour ozone NAAQS since the 2002–2004 monitoring period, and continues to monitor attainment of the NAAQS based on 2004–2006 data. In addition, quality controlled and quality assured ozone data for 2007 that are available in the EPA Air Quality System database, but not yet certified, show this area continues to attain the 8-hour ozone NAAQS. This determination suspends the requirements for this area to submit an attainment demonstration, a reasonable further progress plan, contingency measures, and other planning State Implementation Plans related to attainment of the 8-hour ozone NAAQS and these requirements shall remain suspended for so long as the area continues to attain the ozone NAAQS.

EFFECTIVE DATE: This rule is effective on March 18, 2008.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R01–OAR–2008–0069. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, Suite 1100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: Richard P. Burkhart, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, Suite 1100 (CAQ), Boston, MA 02114–2023, telephone number (617) 918–1664, fax number (617) 918–0664, e-mail *Burkhart.Richard@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

Organization of this document. The following outline is provided to aid in locating information in this preamble.

I. What Action Is EPA Taking?

EPA is determining that the Boston-Manchester-Portsmouth (SE), New Hampshire moderate 8-hour ozone nonattainment area has attained the 8-hour National Ambient Air Quality Standard (NAAQS) for ozone. This determination is based upon certified ambient air monitoring data that show the area has monitored attainment of the ozone NAAQS since the 2002–2004 monitoring period, and monitoring data that continue to show attainment of the NAAQS based on 2004–2006 data. In addition, quality controlled and quality assured ozone data for 2007 that are available in the EPA Air Quality System (AQS) database, but not yet certified, show this area continues to attain the ozone NAAQS.

Other specific requirements of the determination and the rationale for EPA's proposed action are explained in the Notice of Proposed Rulemaking (NPR) published on February 7, 2008 (73 FR 7324) and will not be restated here. No public comments were received on the NPR.

II. What Is the Effect of This Action?

Under the provisions of EPA's ozone implementation rule (see 40 CFR Section 51.918), this determination suspends the requirements for the Boston-Manchester-Portsmouth (SE), New Hampshire moderate ozone nonattainment area to submit an attainment demonstration, a reasonable further progress plan, section 172(c)(9) contingency measures, and any other planning State Implementation Plans (SIPs) related to attainment of the 8-hour ozone NAAQS for so long as the area continues to attain the ozone NAAQS.

This action does not constitute a redesignation to attainment under CAA section 107(d)(3), because the area does not have an approved maintenance plan as required under section 175A of the CAA, nor a determination that the area has met the other requirements for redesignation. The classification and designation status of the area remains moderate nonattainment for the 8-hour ozone NAAQS until such time as EPA determines that it meets the CAA requirements for redesignation to attainment.

If EPA subsequently determines, after notice-and-comment rulemaking in the **Federal Register**, that the area has violated the current 8-hour ozone standard, the basis for the suspension of these requirements would no longer exist, and the area would thereafter have to address the pertinent requirements.

III. When Is This Action Effective?

EPA finds that there is good cause for this approval to become effective on the date of publication of this action in the **Federal Register**, because a delayed effective date is unnecessary due to the nature of the approval. The expedited effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rule actions may become effective less than 30 days after publication if the rule ''grants or recognizes an exemption or relieves a restriction'' and 5 U.S.C. 553(d)(3), which allows an effective date less than 30 days after publication ''as otherwise provided by the agency for good cause found and published with the rule.'' As noted above, this determination of attainment suspends the requirements for New Hampshire to submit an attainment demonstration, a reasonable further progress plan, section 172(c)(9) contingency measures, and any other planning SIPs related to attainment of the 8-hour ozone NAAQS for so long as the area continues to attain the ozone NAAQS. The suspension of these requirements is sufficient reason to allow an expedited effective date of this rule under 5 U.S.C. 553(d)(1). In addition, New Hampshire's suspension from these requirements provides good cause to make this rule effective on the date of publication of this action in the **Federal Register**, pursuant to 5 U.S.C. 553(d)(3). The purpose of the 30-day waiting period prescribed in 5 U.S.C. 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Where, as

here, the final rule suspends requirements rather than imposing obligations, affected parties, such as the State of New Hampshire, do not need time to adjust and prepare before the rule takes effect.

IV. Final Action

EPA is determining that the Boston-Manchester-Portsmouth (SE), New Hampshire 8-hour ozone nonattainment area has attained the 8-hour ozone standard and continues to attain the standard based on data through the 2007 ozone season. As provided in 40 CFR 51.918, this determination suspends the requirements for New Hampshire to submit an attainment demonstration, a reasonable further progress plan, and contingency measures under section 172(c)(9), and any other planning SIP related to attainment of the 8-hour ozone NAAQS for this area, for so long as the area continues to attain the standard.

V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action makes a determination based on air quality data, and results in the suspension of certain Federal requirements. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Because this rule makes a determination based on air quality data, and results in the suspension of certain Federal requirements, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely makes a determination based on air quality data and results in the suspension of certain Federal requirements, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it determines that air quality in the affected area is meeting Federal standards.

The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply because it would be inconsistent with applicable law for EPA, when determining the attainment status of an area, to use voluntary consensus standards in place of promulgated air quality standards and monitoring procedures that otherwise satisfy the provisions of the Clean Air Act.

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

Under Executive Order 12898, EPA finds that this rule involves a determination of attainment based on air quality data and will not have disproportionately high and adverse human health or environmental effects on any communities in the area, including minority and low-income communities.

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 19, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 11, 2008.

Robert W. Varney,

Regional Administrator, EPA New England.

■ Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart EE—New Hampshire

■ 2. Section 52.1534 is amended by adding paragraph (c) to read as follows:

§ 52.1534 Control strategy: Ozone.

* * * * *

(c) *Determination of Attainment.* Effective March 18, 2008, EPA is determining that the Boston-Manchester-Portsmouth (SE), New Hampshire 8-hour ozone nonattainment area has attained the 8-hour ozone standard. Under the provisions of EPA's ozone implementation rule (see 40 CFR 51.918), this determination suspends the reasonable further progress and attainment demonstration requirements of section 182(b)(1) and related requirements of section 172(c)(9) of the Clean Air Act for as long as the area does not monitor any violations of the 8-hour ozone standard. If a violation of the ozone NAAQS is monitored in the Boston-Manchester-Portsmouth (SE), New Hampshire 8-hour ozone nonattainment area, this determination shall no longer apply.

[FR Doc. E8–5406 Filed 3–17–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2007–0907; FRL–8541–3]

Approval and Promulgation of Air Quality Implementation Plans; Indiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving a request submitted by the Indiana Department of Environmental Management (IDEM) on July 20, 2007, as supplemented on December 19, 2007, to revise the Indiana State Implementation Plan (SIP). The submission revises the Indiana Administrative Code (IAC) by amending the definition of ''References to the Code of Federal Regulations,'' to update the references to the Code of Federal Regulations (CFR) to refer to the 2006 edition. The rule revision also makes minor corrections to amend the definition of ''nonphotochemically reactive hydrocarbons'' or ''negligibly photochemically reactive compounds,'' and to amend the definition of ''volatile organic compound'' or ''VOC.''

DATES: This rule is effective on May 19, 2008, unless EPA receives adverse written comments by April 17, 2008. If EPA receives adverse comments, EPA will publish a timely withdrawal of the rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2007–0907 by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: mooney.john@epa.gov.*
- *Fax:* (312) 886–5824.
- *Mail:* John M. Mooney, Chief, Criteria Pollutant Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
- *Hand Delivery:* John M. Mooney, Chief, Criteria Pollutant Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2007–0907. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to section I of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. We recommend that you telephone Charles Hatten, Environmental Engineer, at (312) 886–6031 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Charles Hatten, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6031, *hatten.charles@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. Background

A. When did the State submit the requested SIP revisions to EPA?

IDEM submitted the requested SIP revisions, consisting primarily of an updated reference to the 2006 CFR, on July 20, 2007. IDEM supplemented its request on December 19, 2007.

B. Did Indiana hold public hearings for each of these SIP revisions?

IDEM held public hearings on December 6, 2006, and February 7, 2007. IDEM did not receive any comments concerning the SIP revision.

II. What are the revisions that the State requests be incorporated into the SIP?

The State has requested SIP revisions to include: (1) updated references to the CFR at 326 IAC 1–1–3, and (2) deleted references to outdated **Federal Register** citations at 326 IAC 1–2–48 and 326 IAC 1–2–90.

A. *Rule 326 IAC 1–1–3, definition of ''References to Code of Federal Regulations.''* IDEM updated the reference to the CFR in 326 IAC 1–1–3 from the 2005 edition to the 2006 edition. This is solely an administrative change that allows Indiana to reference a more current version of the CFR.

B. *Rule 326 IAC 1–2–48, ''nonphotochemically reactive hydrocarbons'' or ''negligibly photochemically reactive compounds'' defined.* The minor corrections to amend 326 IAC 1–2–48 delete language in sections (a)(1) and (a)(2) that references outdated **Federal Register** citations.

C. *Rule 326 IAC 1–2–90, ''volatile organic compound'' or ''VOC'' defined.* The minor corrections to amend 326 IAC 1–2–90 delete outdated references to the **Federal Register**.

III. What action is EPA taking today?

We are approving revisions to the Indiana SIP to: (1) Update the definitions at 326 IAC 1–1–3, ''References to the CFR,'' and (2) delete language that references outdated **Federal Register** citations in both 326 IAC 1–2–48, ''nonphotochemically reactive hydrocarbons'' or ''negligibly photochemically reactive compounds'' defined; and 326 IAC 1–2–90, ''volatile organic compound'' or ''VOC'' defined.

We are publishing this action without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the state plan if relevant adverse written comments are filed. This rule will be effective May 19, 2008 without further notice unless we receive relevant adverse written comments by April 17, 2008. If we receive such comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. The EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. If we do not receive any comments, this action will be effective May 19, 2008.

IV. Statutory and Executive Order Reviews

Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget.

Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

Because it is not a ''significant regulatory action'' under Executive Order 12866 or a ''significant energy action,'' this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001).

Regulatory Flexibility Act

This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Unfunded Mandates Reform Act

Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (59 FR 22951, November 9, 2000).

Executive Order 13132: Federalism

This action also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act.

Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

National Technology Transfer Advancement Act

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the state to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 19, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 5

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: March 3, 2008.

Bharat Mathur,

Acting Regional Administrator, Region 5.

■ For the reasons stated in the preamble, part 52, chapter I, of title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart P—Indiana

■ 2. Section 52.770 is amended by adding paragraph (c)(186) to read as follows:

§ 52.770 Identification of plan.

* * * * *

(c) * * *

(186) The Indiana Department of Environmental Management submitted revisions to Indiana's State Implementation plan on July 20, 2007, as revised on December 19, 2007, to amend 326 IAC 1–1–3, ''References to the Code of Federal Regulations''; 326 IAC 1–2–48, ''nonphotochemically reactive hydrocarbons'' or ''negligibly photochemically reactive compounds'' defined; and 326 IAC 1–2–90, ''volatile organic compound'' or ''VOC'' defined. The revision to 326 IAC 1–1–3 updates the references to CFR from the 2005 edition to the 2006 edition. In 326 IAC 1–2–48, and 326 IAC 1–2–90, the SIP revision deletes references to outdated **Federal Register** citations.

(i) *Incorporation by reference.* The following sections of the Indiana Administrative Code (IAC) are incorporated by reference.

(A) 326 IAC 1–1–3, ''References to the Code of Federal Regulations''. Filed with the Secretary of State on April 26, 2007, and effective on May 26, 2007. Published in the Indiana Register, on May 23, 2007 (DIN: 20070523–IR–326060412FRA).

(B) 326 IAC 1–2–48, ''nonphotochemically reactive hydrocarbons'' or ''negligibly photochemically reactive compounds'' defined; and 326 IAC 1–2–90, ''volatile organic compound'' or ''VOC'' defined. Filed with the Secretary of State on April 26, 2007, and effective on May 26, 2007. Published in the Indiana Register, on May 23, 2007 (DIN: 20070523–IR–326060412FRA).

(ii) *Additional Materials.* A December 19, 2007, letter from Daniel Murray, Assistant Commissioner of the Indiana Department of Environmental Management, Office of Air Quality, which limits the July 20, 2007, SIP revision request to the following definitions: 326 IAC 1–1–3, ''References to the CFR''; 326 IAC 1–2–48, ''nonphotochemically reactive hydrocarbons'' or ''negligibly photochemically reactive compounds'' defined; and 326 IAC 1–2–90, ''volatile organic compound'' or ''VOC'' defined.

[FR Doc. E8–5287 Filed 3–17–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–R06–OAR–2007–0969; FRL–8543–5]

Determination of Nonattainment and Reclassification of the Beaumont/Port Arthur 8-Hour Ozone Nonattainment Area; State of Texas; Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule finalizes EPA's finding of nonattainment and reclassification of the Beaumont/Port Arthur 8-hour ozone nonattainment area (BPA area). EPA finds that the BPA area has failed to attain the 8 hour ozone national ambient air quality standard (''NAAQS'' or ''standard'') by June 15, 2007, the attainment deadline set forth in the Clean Air Act (CAA) and Code of Federal Regulations (CFR) for marginal nonattainment areas. As a result, on the effective date of this rule, the BPA area is reclassified by operation of law as a moderate 8-hour ozone nonattainment area. The new moderate area attainment date for the reclassified BPA area is ''as expeditiously as practicable,'' but no later than June 15, 2010. The State of Texas must submit a SIP revision that meets the requirements of the CAA on or before January 1, 2009.

DATES: This final rule is effective on April 17, 2008.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R06–OAR–2007–0969. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214–665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

FOR FURTHER INFORMATION CONTACT: Carl Young, Air Planning Section, (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–7247; fax number 214–665–7263; e-mail address *young.carl@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' and ''our'' means EPA.

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I. What Is the Background for This Action?

The BPA area was classified as a marginal 8-hour ozone nonattainment area and, therefore, was required to attain the 8-hour ozone standard by June 15, 2007 (69 FR 23858). On October 30, 2007, we proposed to find that the BPA ozone nonattainment area did not attain the 8-hour ozone NAAQS by June 15, 2007, the applicable attainment date, (72 FR 61310). The proposed finding was based upon ambient air quality data from the years 2004, 2005, and 2006 that showed the area's air quality violated the standard. In addition, as explained in the proposed rule, the area did not qualify for an attainment date extension under the provisions of section 181(a)(5) and 40 CFR 51.907, because the area's 4th highest daily maximum 8-hour

average ozone value in the attainment year of 2006 was greater than 0.084 parts per million (ppm). In the October 30, 2007, proposal, we also proposed that the appropriate reclassification of the BPA area would be from ''marginal'' to ''moderate'' nonattainment, in accordance with CAA Section 181(b)(2). We further proposed that the State of Texas submit the required SIP revision by January 1, 2009.

II. What Comments Did EPA Receive on the October 30, 2007 Proposal and How Has EPA Responded to Them?

We received 18 comment letters on our proposal to find the BPA ozone nonattainment area failed to attain the 8-hour ozone NAAQS by June 15, 2007 and to reclassify the area from marginal to moderate and on our proposed schedule for the required SIP revision submittal (72 FR 61310). Comments were received from: Beaumont City Council Member; ChevronPhillips Chemical Company's Orange Plant; ChevronPhillips Chemical Company's Port Arthur Plant; Clean Air and Water, Inc.; Entergy Texas; Gerdau Ameristeel Beaumont; Goodyear Tire and Rubber Company; Greater Port Arthur Texas Chamber of Commerce; Hardin County Commissioner's Court; Huntsman Petrochemical Corporation; Jefferson County Commissioner for Precinct 1; Jefferson County Commissioner for Precinct 4; Jefferson County Judge; LANXESS Corporation; Port Arthur City Manager; Southeast Texas Chapter of Texas Association of Business; South East Texas Regional Planning Commission; and the Texas Commissions on Environmental Quality (TCEQ).

Comments can be found on the Internet in the electronic docket for this action. To access the comments, please go to *http://www.regulations.gov* and search for Docket No. EPA–R06–OAR–2007–0969, or contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph above. A summary of the relevant comments and EPA's response to the comments received is presented below.

Comment: Sixteen of the commenters requested that EPA postpone finalizing the reclassification because current monitoring data are showing attainment and requested that EPA instead allow the area the opportunity to file for redesignation to attainment for the 8-hour ozone standard. To support their request for EPA to not finalize the reclassification, many discussed the status of the air quality in the BPA area, noting that it is much cleaner today than it was in 1990 at the time the CAA amendments were finalized: (1) Monitored levels of nitrogen oxides and volatile organic compounds are at least 40–50% lower than 10 years ago, (2) major reductions in monitored air toxic levels continue and after 17 years of monitoring, there is no evidence of air toxic hot spots, (3) ozone has been improving in the area in both design value and number of exceedances and (4) this improvement is due to the tremendous amount of work done by local industry, businesses, and community.

Response: We recognize the efforts taken by TCEQ, the Southeast Texas Planning Commission, local industry, businesses, and the community to improve air quality. EPA acknowledges that the area's air quality data has improved, but the area did not meet the 8-hour ozone standard by the applicable June 15, 2007 attainment date. TCEQ, itself, agreed the BPA area's air quality was not below the 8-hour ozone standard for the years 2004, 2005, and 2006. These three years of air quality data provide the area's design value ''as of the attainment date.'' This value shows that the area did not attain the standard by the applicable attainment date. The Act requires EPA to make an attainment determination within six months following the attainment date. Reclassification upon a determination of failure is not a discretionary power and EPA cannot waive reclassification after it has determined that the area has failed to attain by its attainment date.

In our October 30, 2007, proposed rule (72 FR 61310), we cited section 181(b)(2)(A) of the CAA, which provides that, for reclassification upon failure to attain, ''within 6 months following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date. Except for any Severe or Extreme area, any area that the Administrator finds has not attained the standard by that date shall be reclassified by operation of law in accordance with table 1 of subsection (a) (of Section 181) to the higher of—(i) the next higher classification for the area, or (ii) the classification applicable to the area's design value as determined at the time of the notice required under subparagraph (B).'' Pursuant to section 181(b)(2), we have determined that the BPA area failed to attain the 8-hour ozone NAAQS by June 15, 2007, the attainment deadline set forth in the CAA and CFR for marginal nonattainment areas. Because the area is not classified as Severe or Extreme, the area shall be reclassified by operation of law to the next higher classification. The next higher classification for the area (moderate) is higher than the classification applicable to the area's design value (marginal). Therefore, in accordance with the CAA, the BPA area must be reclassified by operation of law to a moderate nonattainment area. 72 FR 61312.

As EPA noted above, under section 181(b)(2)(A), the attainment determination is made solely based on air quality, and any reclassification is by operation of law. Thus, the resulting requirements apply regardless of how the nonattainment came about, and the CAA requires EPA to consider only the air quality data occurring as of the attainment date (including any extension thereof), in making the mandatory attainment determination.

Today's action, however, does not preclude TCEQ from developing and submitting the appropriate documentation for redesignation of the area from nonattainment to attainment. The appropriate documentation would be the submittal after public notice, public comment period, and public hearing of a complete redesignation request that meets the requirements of the Act and the Phase 1 8-hour ozone implementation rule, and an approvable plan for maintenance of the 8-hour ozone standard.[1] The September 4, 1992 Calcagni memorandum and the 1993 Shapiro memorandum describe EPA's interpretation of section 107(d)(3)(E) with respect to the timing of applicable requirements. Under this interpretation, to qualify for redesignation, States requesting redesignation to attainment must meet the relevant Clean Air Act requirements that came due prior to the submittal of a complete redesignation request. Applicable requirements of the Act that come due subsequent to the

[1] For more information on redesignation to attainment, please see, among other things, the General Preamble for the Implementation of Title I of the CAA Amendments of 1990, published on April 16, 1992 (57 FR 13498), and supplemented on April 28, 1992 (57 FR 18070); ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (available at: *http://www.epa.gov/ttn/oarpg/t5/memoranda/redesignmem090492.pdf*); ''State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) On or After November 15, 1992,'' Memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation, September 17, 1993 (available at: *http://www.epa.gov/ttn/caaa/t1/memoranda/redesig.pdf*); the redesignation of Detroit-Ann Arbor published ion March 7, 1995 (60 FR 12459, 12465–12466, and EPA's Final Rule to Implement the 8-Hour Ozone NAAQS–Phase 1 and the Notice of Reconsideration at 69 FR 23951 (April 30, 2004) and 70 FR 30592, 30604 (May 26, 2005).

area's submittal of a complete redesignation request remain applicable until a redesignation is approved, but are not required as a prerequisite to redesignation. Section 175A(c) of the Act. *Sierra Club* v. *EPA*, 375 F.3d 537 (7th Cir. 2004). *See also*, 68 FR at 25424, 25427 (May 12, 2003) (redesignation of St. Louis).

Comment: One commenter stated that (1) the area did miss the June 15, 2007 attainment date; (2) action on this matter should be based on real data, not speculation of attainment in the near future; and (3) the area's petrochemical industry is currently undergoing expansions which will result in more air emissions. Consequently, the recommendation was that the area be classified as moderate until attainment is actually achieved.

Response: EPA agrees with the commenter supporting the proposal. As quality-assured data for the area shows the area did not attain the 8-hour ozone standard by the June 15, 2007 attainment date, the area is being reclassified by operation of law as moderate nonattainment. Regarding the commenter's concern about industry expansions and more air emissions, the State's Nonattainment New Source Review (NNSR) permitting requirements apply to new major sources or major modifications at existing air pollution sources, such as the petrochemical industry expansions. The NNSR permit issued by the State must require that the emissions increase from the new source or modification be offset. The NNSR permit also requires the source to reduce emissions consistent with the application of lowest achievable emission rate as defined in 40 CFR 51.165(a)(1)(xiii). The State's permitting rules provide that the TCEQ will assure that emissions from a new minor source or minor modification will not interfere with attainment or maintenance of a national ambient air quality standard.

Comment: The State's concern was that the schedule for submittal of the SIP revision would require use of existing and somewhat outdated technical data due to the short timeframe. TCEQ commented that for any SIP revision, the most current and robust technical work is optimal, but due to the short timeframe for submittal, if they are required to submit an attainment demonstration SIP revision for the area by January 1, 2009, use of existing and somewhat outdated technical work will be necessary.

Response: With respect to any potential burden imposed by the new planning requirements, EPA notes that the moderate area requirements are imposed by section 182(b) of the CAA and the impact of a reclassification is not a consideration in making the attainment determination under section 181(b)(2). When an area is reclassified, the EPA has the authority under section 182(i) of the Act to adjust the Act's submittal deadlines for any new SIP revisions that are required as a result of reclassification. Although some may argue that January 1, 2009 provides a short timeframe for submittal of a revised SIP, pursuant to 40 CFR 51.908(d), the State must provide for implementation of all control measures needed for attainment no later than January 1, 2009, the beginning of the attainment year ozone season for the BPA area. See 40 CFR 51.900(g) and 40 CFR part 58, Appendix D, section 4.1, Table D–3 (71 FR 61236).

Establishing the date for submittal as January 1, 2009 will help the State to optimize, to the extent possible, its public consultation and rulemaking process to choose control strategies, adopt, and implement them swiftly in order to avoid the possibility of the area failing to attain again and being reclassified to serious. Given the submittal deadline, the State should use the best and most up-to-date information available in the allotted timeframe. For more discussion of the SIP submittal date, please see the section titled ''Proposed Date for Submitting a Revised SIP for the BPA Area'' in our proposed action (72 FR 61310, October 30, 2007).

Comment: TCEQ also asked for clarification regarding the following sentences in the proposal notice at page 61321: ''The BPA area may attain the 8-hour ozone standard at the end of 2007, based on data from 2005, 2006 and 2007. If EPA determines, after notice and comment rulemaking, that the area has attained the standard at the end of 2007, the requirement to submit SIPs related to attainment of the standard shall be suspended until such time as (1) the area is redesignated to attainment, at which time the requirements no longer apply; or (2) EPA determines that the area has violated the 8-hour ozone NAAQS (40 CFR 51.918).''

The State asked in particular whether EPA would set a new SIP submittal deadline after notice and comment rulemaking.

Response: The staffs of both agencies have been in contact to discuss various potential legal avenues available to the State of Texas. The State staff is considering the pros and cons of the potential legal avenues.

One of the potential legal avenues is the use of our clean data regulation for the 8-hour ozone standard (40 CFR 51.918). This is the legal avenue alluded to in the proposal. Under this regulation, if after EPA makes a clean data determination that results in the suspension of the requirement to submit certain SIPs, and EPA later determines that the area violates the 8-hour ozone NAAQS, EPA would establish a new SIP submittal deadline for these SIP requirements after notice and comment rulemaking. As EPA stated in its May 10, 1995 Memorandum ''Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard for the 1-hour NAAQS'', ''[i]f EPA subsequently determines that an area has violated the standard * * *. EPA would notify the State of that determination and would also provide notice to the public in the **Federal Register**. Such a determination would mean that the area would thereafter have to address the pertinent SIP requirements within a reasonable amount of time, which EPA would establish taking into account the individual circumstances surrounding the particular SIP submissions at issue.'' (pp. 6–7).

A potential consequence of relying upon this avenue is that depending on the timing of a violation and of an EPA rulemaking determining that a violation had occurred, it is possible that the BPA area would not be able to attain by its new moderate area attainment date, and therefore may be subject to another determination of nonattainment and reclassification to a higher classification than moderate.

III. What is the Effect of This Action?

A. Determination of Nonattainment, Reclassification of the BPA Area to Moderate and the New Attainment Date for the BPA Area

Pursuant to section 181(b)(2), we find that the BPA area failed to attain the 8-hour ozone NAAQS by the June 15, 2007, attainment deadline prescribed under the CAA and 69 FR 23858 (April 30, 2004) for marginal ozone nonattainment areas. When this finding is effective, the BPA area is reclassified by operation of law from marginal nonattainment to moderate nonattainment. The reclassification to the next higher classification is mandated by Section 181(b)(2)(A) of the CAA. Moderate areas are required to attain the standard ''as expeditiously as practicable'' but no later than 6 years after designation or June 15, 2010. The ''as expeditiously as practicable'' attainment date will be determined as part of the action on the required SIP

submittal demonstrating attainment of the 8-hour ozone standard. Also in this action, we are establishing a schedule by which Texas will submit the SIP revision necessary for the reclassification to moderate nonattainment of the 8-hour ozone standard.

B. What Is the Date for Submitting a Revised SIP for the BPA Area?

We must address the schedule by which Texas is required to submit the SIP revision addressing the requirements for the BPA area. When an area is reclassified, we have the authority under section 182(i) of the CAA to adjust the CAA's submittal deadlines for any new SIP revisions that are required as a result of the reclassification. Pursuant to 40 CFR 51.908(d), for each nonattainment area, a state must provide for implementation of all control measures needed for attainment no later than the beginning of the attainment year ozone season. The attainment year ozone season is the ozone season immediately preceding a nonattainment area's attainment date, in this case 2009 (40 CFR 51.900(g)). The ozone season is the ozone monitoring season as defined in 40 CFR part 58, Appendix D, section 4.1, Table D–3 (October 17, 2006, 71 FR 61236). For the purposes of this reclassification for the BPA area, January 1, 2009 is the beginning of the ozone monitoring season. As a result, we are requiring that the required SIP revision be submitted by Texas as expeditiously as practicable, but no later than January 1, 2009.

A revised SIP must include, among other things, all the moderate area requirements in section 182(b) of the Act: (1) An attainment demonstration (40 CFR 51.908), (2) provisions for reasonably available control technology and reasonably available control measures (40 CFR 51.912), (3) reasonable further progress reductions in volatile organic compound (VOC) and nitrogen oxide (NO_X) emissions (40 CFR 51.910), and (4) contingency measures to be implemented in the event of failure to meet a milestone or attain the standard (CAA 172(c)(9)).[2] See also the requirements for moderate ozone nonattainment areas set forth in CAA section 182(b). Since the BPA area also is a 1-hour ozone nonattainment area, the anti-backsliding requirements of 40 CFR 51.900 and 51.905 apply also. See also *South Coast Air Quality Mgmt. Dist.* v. *EPA*, 472 F.3d 882 (D.C. Cir. 2006), mod. (June 8, 2007).

[2] A vehicle inspection and maintenance (I/M) program would normally be listed as a requirement for an ozone moderate or above nonattainment area. However, the Federal I/M Flexibility Amendments of 1995 determined that urbanized areas with populations less than 200,000 for 1990 (such as BPA) are not mandated to participate in the I/M program (60 FR 48027, September 18, 1995).

IV. Final Action

Pursuant to CAA section 181(b)(2), we are making a final determination that the Beaumont/Port Arthur ''marginal'' 8-hour ozone nonattainment area failed to attain the 8 hour ozone NAAQS by June 15, 2007. Upon the effective date of this rule, the area is reclassified by operation of law as a moderate 8-hour ozone nonattainment area. Pursuant to section 182(i) of the CAA, we are establishing the schedule for submittal of the SIP revision required for moderate areas once the area is reclassified. The required SIP revision for the BPA area shall be submitted by the State of Texas as expeditiously as practicable, but no later than January 1, 2009.

V. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO. The Agency has determined that the finding of nonattainment would result in none of the effects identified in the Executive Order. Under section 181(b) (2) of the CAA, determinations of nonattainment are based upon air quality considerations and the resulting reclassifications must occur by operation of law.

B. Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This action to reclassify the BPA area as a moderate ozone nonattainment area and to adjust applicable deadlines does not establish any new information collection burden. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this action on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards. (See 13 CFR part 121.); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. Determinations of nonattainment and the resulting reclassification of nonattainment areas by operation of law under section 181(b) (2) of the CAA do not in and of themselves create any new requirements. Instead, this rulemaking only makes a factual determination, and does not directly regulate any entities. After considering the economic impacts of today's action on small entities, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local,

and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation as to why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This action does not include a Federal mandate within the meaning of UMRA that may result in expenditures of $100 million or more in any one year by either State, local, or Tribal governments in the aggregate or to the private sector, and therefore, is not subject to the requirements of sections 202 and 205 of the UMRA. Also, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments and therefore, is not subject to the requirements of section 203. EPA believes, as discussed previously in this document, that the finding of nonattainment is a factual determination based upon air quality considerations and that the resulting reclassification of the area must occur by operation of law. Thus, EPA believes that the finding does not constitute a Federal mandate, as defined in section 101 of the UMRA, because it does not impose an enforceable duty on any entity.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action merely determines that the BPA area had not attained by its applicable attainment date, and to reclassify the BPA area as a moderate ozone nonattainment area and to adjust applicable deadlines. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This action does not have ''Tribal implications'' as specified in Executive Order 13175. This action merely determines that the BPA area has not attained by its applicable attainment date, and to reclassify the BPA area as a moderate ozone nonattainment area and to adjust applicable deadlines. The Clean Air Act and the Tribal Authority Rule establish the relationship of the Federal government and Tribes in developing plans to attain the NAAQS, and this rule does nothing to modify that relationship. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045: ''Protection of Children From Environmental Health and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This action is not subject to Executive Order 13045 because it is not economically significant as defined in E.O. 12866, and because the Agency does not have reason to believe the environmental health risks or safety risks addressed by this rule present a disproportionate risk to children. This action merely determines that the BPA area has not attained the standard by the applicable attainment date, and to reclassify the BPA area as a moderate ozone nonattainment area and to adjust applicable deadlines.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, ''Actions That Significantly Affect Energy Supply, Distribution, or Use,'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable VCS. This action merely determines that the BPA nonattainment area has not attained by its applicable attainment date, and to reclassify the BPA ''marginal'' nonattainment area as a ''moderate'' ozone nonattainment area and to adjust applicable deadlines. It does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This action merely determines that the BPA nonattainment area has not attained by its applicable attainment date, and to reclassify the BPA nonattainment area as a moderate ozone nonattainment area and to adjust applicable deadlines.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 19, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action to reclassify the BPA area as a moderate ozone nonattainment area and to adjust applicable deadlines may not be challenged later in proceedings to enforce its requirements. (See section 307(b) (2).)

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: March 6, 2008.

Richard E. Greene,

Regional Administrator, Region 6.

■ Part 81, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 81—[AMENDED]

■ 1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 2. In § 81.344 the table entitled ''Texas—Ozone (8-hour Standard)'' is amended by revising the entries for Beaumont/Port Arthur, TX to read as follows:

§ 81.344 Texas.

* * * * *

TEXAS—OZONE

[8-hour standard]

Designated area	Designation [a]		Classification	
	Date [1]	Type	Date [1]	Type
Beaumont/Port Arthur, TX:				
Hardin County		Nonattainment	(3)	Subpart 2/Moderate.
Jefferson County		Nonattainment	(3)	Subpart 2/Moderate.
Orange County		Nonattainment	(3)	Subpart 2/Moderate.
* * *	*	*	*	*

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is June 15, 2004, unless otherwise noted.
* * * * * * *
[3] April 17, 2008.

[FR Doc. E8–5403 Filed 3–17–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 080311419–8426–01]

RIN 0648–XG33

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule.

SUMMARY: The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the Atlantic Large Whale Take Reduction Plan's (ALWTRP) implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 1,370 nm^2 (4,699 km^2), northeast of Boston, Massachusetts for 15 days. The purpose of this action is to provide protection to

an aggregation of northern right whales (right whales).

DATES: Effective beginning at 0001 hours March 20, 2008, through 2400 hours April 3, 2008.

ADDRESSES: Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, One Blackburn Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Diane Borggaard, NMFS/Northeast Region, 978–281–9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–2322.

SUPPLEMENTARY INFORMATION:

Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at *http://www.nero.noaa.gov/whaletrp/*.

Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) due to incidental interaction with commercial fishing activities. In addition, the measures identified in the ALWTRP would provide conservation benefits to a fourth species (minke), which are neither listed as endangered nor threatened under the Endangered Species Act (ESA). The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specific authority for NMFS to restrict temporarily on an expedited basis the use of lobster trap/pot and anchored gillnet fishing gear in areas north of 40° N. lat. to protect right whales. Under the DAM program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 15–day period; (2) allow lobster trap/pot and anchored gillnet fishing within a DAM zone with gear modifications determined by NMFS to sufficiently reduce the risk of entanglement; and/or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap/pot and anchored gillnet gear for a 15–day period and asking fishermen not to set any additional gear in the DAM zone during the 15–day period.

A DAM zone is triggered when NMFS receives a reliable report from a qualified individual of three or more right whales sighted within an area (75 nm^2 (257 km^2)) such that right whale density is equal to or greater than 0.04 right whales per nm^2 (3.43 km^2). A qualified individual is an individual ascertained by NMFS to be reasonably able, through training or experience, to identify a right whale. Such individuals include, but are not limited to, NMFS staff, U.S. Coast Guard and Navy personnel trained in whale identification, scientific research survey personnel, whale watch operators and naturalists, and mariners trained in whale species identification through disentanglement training or some other training program deemed adequate by NMFS. A reliable report would be a credible right whale sighting.

On March 7, 2008, an aerial survey reported an aggregation of four right whales in the proximity of 42° 38′ N. latitude and 69° 32′ W. long. The position lies approximately 70nm northeast of Boston, Massachusetts. After conducting an investigation, NMFS ascertained that the report came from a qualified individual and determined that the report was reliable. Thus, NMFS has received a reliable report from a qualified individual of the requisite right whale density to trigger the DAM provisions of the ALWTRP.

Once a DAM zone is triggered, NMFS determines whether to impose restrictions on fishing and/or fishing gear in the zone. This determination is based on the following factors, including but not limited to: the location of the DAM zone with respect to other fishery closure areas, weather conditions as they relate to the safety of human life at sea, the type and amount of gear already present in the area, and a review of recent right whale entanglement and mortality data.

NMFS has reviewed the factors and management options noted above relative to the DAM under consideration. As a result of this review, NMFS prohibits lobster trap/pot and anchored gillnet gear in this area during the 15–day restricted period unless it is modified in the manner described in this temporary rule.

The DAM Zone is bound by the following coordinates:

42° 59′ N., 70° 00′ W. (NW Corner)
42° 59′ N., 69° 04′ W.
42° 18′ N., 69° 04′ W.
42° 18′ N., 69° 24′ W.
42° 30′ N., 69° 24′ W.
42° 30′ N., 70° 00′ W.
42° 59′ N., 70° 00′ W. (NW Corner)

In addition to those gear modifications currently implemented under the ALWTRP at 50 CFR 229.32, the following gear modifications are required in the DAM zone. If the requirements and exceptions for gear modification in the DAM zone, as described below, differ from other ALWTRP requirements for any overlapping areas and times, then the more restrictive requirements will apply in the DAM zone. Special note for gillnet fishermen: portions of the DAM zone overlap the Northeast Multispecies year-round Cashes Ledge Closure Area found at 50 CFR 648.81(d), the Northeast Multispecies year-round Western Gulf of Maine Closure Area found at 50 CFR 648.81(e), the (March) Northeast Multispecies seasonal Gulf of Maine Rolling Closure Area I found at 50 CFR 648.81(f)(1)(i),and the (April) Northeast Multispecies seasonal Gulf of Maine Rolling Closure Area II found at 50CFR 648.81 (f)(1)(ii). Due to these closures, sink gillnet gear is prohibited from these portions of the DAM zone.

Lobster Trap/Pot Gear

Fishermen utilizing lobster trap/pot gear within portions of Northern Nearshore Lobster Waters that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;

3. Fishermen are allowed to use two buoy lines per trawl; and

4. A weak link with a maximum breaking strength of 600 lb (272.4 kg) must be placed at all buoys.

Fishermen utilizing lobster trap/pot gear within the portion of the Offshore Lobster Waters Area that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;

3. Fishermen are allowed to use two buoy lines per trawl; and

4. A weak link with a maximum breaking strength of 1,500 lb (680.4 kg) must be placed at all buoys.

Anchored Gillnet Gear

Fishermen utilizing anchored gillnet gear within the portions of the Other Northeast Gillnet Waters Area that overlap with the DAM zone are required to utilize all the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;

3. Fishermen are allowed to use two buoy lines per string;

4. The breaking strength of each net panel weak link must not exceed 1,100 lb (498.8 kg). The weak link requirements apply to all variations in net panel size. One weak link must be placed in the center of the floatline and one weak link must be placed in the center of each of the up and down lines at both ends of the net panel. Additionally, one weak link must be placed as close as possible to each end of the net panels on the floatline; or, one weak link must be placed between floatline tie-loops between net panels and one weak link must be placed where the floatline tie-loops attach to the bridle, buoy line, or groundline at each end of a net string;

5. A weak link with a maximum breaking strength of 1,100 lb (498.8 kg) must be placed at all buoys; and

6. All anchored gillnets, regardless of the number of net panels, must be securely anchored with the holding power of at least a 22 lb (10.0 kg) Danforth-style anchor at each end of the net string.

The restrictions will be in effect beginning at 0001 hours March 20, 2008, through 2400 hours April 3, 2008, unless terminated sooner or extended by NMFS through another notification in the **Federal Register**.

The restrictions will be announced to state officials, fishermen, ALWTRT members, and other interested parties through e-mail, phone contact, NOAA website, and other appropriate media immediately upon issuance of the rule by the AA.

Classification

In accordance with section 118(f)(9) of the MMPA, the Assistant Administrator (AA) for Fisheries has determined that this action is necessary to implement a take reduction plan to protect North Atlantic right whales.

Environmental Assessments for the DAM program were prepared on December 28, 2001, and August 6, 2003. This action falls within the scope of the analyses of these EAs, which are available from the agency upon request.

NMFS provided prior notice and an opportunity for public comment on the regulations establishing the criteria and procedures for implementing a DAM zone. Providing prior notice and opportunity for comment on this action, pursuant to those regulations, would be impracticable because it would prevent NMFS from executing its functions to protect and reduce serious injury and mortality of endangered right whales. The regulations establishing the DAM program are designed to enable the agency to help protect unexpected concentrations of right whales. In order to meet the goals of the DAM program, the agency needs to be able to create a DAM zone and implement restrictions on fishing gear as soon as possible once the criteria are triggered and NMFS determines that a DAM restricted zone is appropriate. If NMFS were to provide prior notice and an opportunity for public comment upon the creation of a DAM restricted zone, the aggregated right whales would be vulnerable to entanglement which could result in serious injury and mortality. Additionally, the right whales would most likely move on to another location before NMFS could implement the restrictions designed to protect them, thereby rendering the action obsolete. Therefore, pursuant to 5 U.S.C. 553(b)(B), the AA finds that good cause exists to waive prior notice and an opportunity to comment on this action to implement a DAM restricted zone to reduce the risk of entanglement of endangered right whales in commercial lobster trap/pot and anchored gillnet gear as such procedures would be impracticable.

For the same reasons, the AA finds that, under 5 U.S.C. 553(d)(3), good cause exists to waive the 30–day delay in effective date. If NMFS were to delay for 30 days the effective date of this action, the aggregated right whales would be vulnerable to entanglement, which could cause serious injury and mortality. Additionally, right whales would likely move to another location between the time NMFS approved the action creating the DAM restricted zone and the time it went into effect, thereby rendering the action obsolete and ineffective. Nevertheless, NMFS recognizes the need for fishermen to have time to either modify or remove (if not in compliance with the required restrictions) their gear from a DAM zone once one is approved. Thus, NMFS makes this action effective 2 days after the date of publication of this document in the **Federal Register**. NMFS will also endeavor to provide notice of this action to fishermen through other means upon issuance of the rule by the AA, thereby providing approximately 3 additional days of notice while the Office of the Federal Register processes the document for publication.

NMFS determined that the regulations establishing the DAM program and actions such as this one taken pursuant to those regulations are consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program of the U.S. Atlantic coastal states. This determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. Following state review of the regulations creating the DAM program, no state disagreed with NMFS' conclusion that the DAM program is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program for that state.

The DAM program under which NMFS is taking this action contains policies with federalism implications warranting preparation of a federalism assessment under Executive Order 13132. Accordingly, in October 2001 and March 2003, the Assistant Secretary for Intergovernmental and Legislative Affairs, Department of Commerce, provided notice of the DAM program and its amendments to the appropriate elected officials in states to be affected by actions taken pursuant to the DAM program. Federalism issues raised by state officials were addressed in the final rules implementing the DAM program. A copy of the federalism Summary Impact Statement for the final rules is available upon request (**ADDRESSES**).

The rule implementing the DAM program has been determined to be not significant under Executive Order 12866.

Authority: 16 U.S.C. 1361 *et seq.* and 50 CFR 229.32(g)(3)

Dated: March 12, 2008.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

[FR Doc. 08–1042 Filed 3–13–08; 1:39 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 73, No. 53
Tuesday, March 18, 2008

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 927, 966, and 984

[Docket Nos. AMS–FV–08–0008, FV08–927–610 Review; AMS–FV–08–0009, FV08–966–610 Review; AMS–FV–08–0010, FV08–984–610 Review]

Pears Grown in Oregon and Washington; Tomatoes Grown in Florida; and Walnuts Grown in California; Section 610 Reviews

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of Review and Request for Comments.

SUMMARY: This document announces that the Agricultural Marketing Service (AMS) plans to review Marketing Order 927 (Pears Grown in Oregon and Washington), Marketing Order 966 (Tomatoes Grown in Florida), and Marketing Order 984 (Walnuts Grown in California) under the criteria contained in section 610 of the Regulatory Flexibility Act (RFA).

DATES: Written comments on this notice must be received by May 19, 2008.

ADDRESSES: Interested persons are invited to submit written comments concerning this notice of review. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250–0237; Fax: (202) 720–8938, or Internet: *http://www.regulations.gov.* All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or may be viewed at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Gary D. Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Portland, Oregon; Telephone: (503) 326–2724; Fax: (503) 326–7440; or E-mail: *GaryD.Olson@usda.gov* regarding the Oregon-Washington pear marketing order; Christian Nissen, Southeast Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Winter Haven, Florida; Telephone: (863) 324–3375; Fax: (863) 325–8793; or E-mail: *Christian.Nissen@usda.gov* regarding the Florida tomato marketing order; or Kurt J. Kimmel, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Fresno, California; Telephone: (559) 487–5901; Fax: (559) 487–5906; or E-mail: *Kurt.Kimmel@USDA.gov* regarding the California walnut marketing order.

SUPPLEMENTARY INFORMATION: Marketing Order No. 927, as amended (7 CFR part 927), regulates the handling of pears grown in Oregon and Washington. Marketing Order No. 966, as amended (7 CFR part 966), regulates the handling of tomatoes grown in Florida. Marketing Order No. 984, as amended (7 CFR part 984), regulates the handling of walnuts grown in California. These marketing orders are effective under the Agricultural Marketing Agreement Act of 1937 (AMAA), as amended (7 U.S.C. 601–674).

AMS initially published in the **Federal Register** on February 18, 1999 (64 FR 8014), its plan to review certain regulations, including Marketing Order Nos. 927, 966, and 984, under criteria contained in section 610 of the RFA (5 U.S.C. 601–612). Due to certain changes and additions, updated plans were published in the **Federal Register** on January 4, 2002 (67 FR 525), August 14, 2003 (68 FR 48574), and finally on March 24, 2006 (71 FR 14827). Because many AMS regulations impact small entities, AMS has decided, as a matter of policy, to review certain regulations which, although they may not meet the threshold requirement under section 610 of the RFA, warrant review.

The Florida tomato marketing order originally was scheduled for review in 2002. A notice of review and request for comments was published in the **Federal Register** on June 24, 2002 (67 FR 425303). One comment was received as a result of that notice. To the extent relevant, that comment will be taken into consideration in this review.

The purpose of the review will be to determine whether the marketing orders for Oregon and Washington pears, Florida tomatoes, and California walnuts should be continued without change, amended, or terminated (consistent with the objectives of the AMAA) to minimize the impacts on small entities. In conducting these reviews, AMS will consider the following factors: (1) The continued need for each of the marketing orders; (2) the nature of complaints or comments received from the public concerning these marketing orders; (3) the complexity of these marketing orders; (4) the extent to which these marketing orders overlap, duplicate, or conflict with other Federal rules, and, to the extent feasible, with State and local governmental rules; and (5) the length of time since these marketing orders have been evaluated, or the degree to which technology, economic conditions, or other factors have changed in the areas affected by these marketing orders.

Written comments, views, opinions, and other information regarding the impact these marketing orders have on small businesses are invited.

Dated: March 12, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–5360 Filed 3–17–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 955

[Docket No. AMS–FV–07–0159; FV08–955–1 PR]

Vidalia Onions Grown in Georgia; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule would increase the assessment rate established for the Vidalia Onion Committee (Committee) for the 2008 and subsequent fiscal periods from $0.10 to $0.13 per 40-pound container of Vidalia onions handled. The Committee locally administers the marketing order which regulates the handling of Vidalia onions

grown in Georgia. Assessments upon Vidalia onion handlers are used by the Committee to fund reasonable and necessary expenses of the program. The fiscal period begins January 1 and ends December 31. The assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Comments must be received by April 17, 2008.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or Internet: *http://www.regulations.gov.* Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Doris Jamieson, Marketing Specialist, or Christian D. Nissen, Regional Manager, Southeast Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA; Telephone: (863) 324–3375, Fax: (863) 325–8793, or E-mail: *Doris.Jamieson@usda.gov,* or *Christian.Nissen@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 955, both as amended (7 CFR part 955), regulating the handling of Vidalia onions grown in Georgia, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, Vidalia onion handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as proposed herein would be applicable to all assessable Vidalia onions beginning on January 1, 2008, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule would increase the assessment rate established for the Committee for the 2008 and subsequent fiscal periods from $0.10 to $0.13 per 40-pound container of Vidalia onions.

The Vidalia onion marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of Vidalia onions. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2005 and subsequent fiscal periods, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on December 13, 2007, and unanimously recommended 2008 expenditures of $712,000 and an assessment rate of $0.13 per 40-pound container of Vidalia onions. In comparison, last year's budgeted expenditures were $835,200. The assessment rate of $0.13 is $0.03 higher than the rate currently in effect.

Over the past few years, the Committee has been using funds from reserves rather than increasing assessments to cover their expanded marketing program. This has reduced the reserve fund. The increase in the assessment rate would allow the Committee to fund its recommended level of promotion, while reducing the amount drawn from its authorized reserve fund.

The major expenditures recommended by the Committee for the 2008 fiscal year include $410,000 for marketing, $86,350 for salaries, $42,800 for compliance, and $37,200 for research. Budgeted expenses for these items in 2007 were $505,000, $82,000, $20,000, and $65,500, respectively.

The assessment rate recommended by the Committee was derived by considering available reserves, and dividing anticipated expenses by expected shipments of Vidalia onions. Vidalia onion shipments for the year are estimated at 4,300,000 40-pound containers, which should provide $559,000 in assessment income. Income derived from handler assessments, along with interest income and funds from the Committee's authorized reserve, would be adequate to cover budgeted expenses. Funds in the reserve (currently $204,000) would be kept within the maximum permitted by the order (according to § 955.44, approximately three fiscal periods' expenses).

The proposed assessment rate would continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate would be in effect for an indefinite period, the Committee would continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA would evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's 2008 budget and those for subsequent fiscal periods would be

reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 86 producers of Vidalia onions in the production area and approximately 65 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts less than $750,000, and small agricultural service firms, which include handlers, are defined as those whose annual receipts are less than $6,500,000 (13 CFR 121.201).

Based on the Georgia Agricultural Statistical Service and Committee data, the average annual grower price for fresh Vidalia onions during the 2007 season was around $15 per 40-pound container. Total Vidalia onions shipments for the 2007 season were around 4,868,000 40-pound containers. Using available data, more than 90 percent of Vidalia onion handlers could be considered small businesses under the SBA definition. In addition, based on information from the Georgia Department of Agriculture, Committee data, and the National Agricultural Statistics Service, the majority of producers could be considered small entities. Thus, the majority of handlers and producers of Vidalia onions may be classified as small entitles.

This rule would increase the assessment rate established for the Committee and collected from handlers for the 2008 and subsequent fiscal periods from $0.10 to $0.13 per 40-pound container of Vidalia onions. The Committee unanimously recommended 2008 expenditures of $712,000 and an assessment rate of $0.13 per 40-pound container. The proposed assessment rate of $0.13 is $0.03 higher than the 2007 rate. The quantity of assessable Vidalia onions for the 2008 fiscal year is estimated at 4,300,000. Thus, the $0.13 rate should provide $559,000 in assessment income. Income derived from handler assessments, along with interest income and funds from the Committee's authorized reserve, would be adequate to cover budgeted expenses.

The major expenditures recommended by the Committee for the 2008 fiscal year include $410,000 for marketing, $86,350 for salaries, $42,800 for compliance, and $37,200 for research. Budgeted expenses for these items in 2007 were $505,000, $82,000, $20,000, and $65,500, respectively.

Over the past few years, the Committee has been using funds from reserves rather than increasing assessments to cover their expanded marketing program. This has reduced the reserve fund. The increase in the assessment rate would allow the Committee to fund its recommended level of promotion, while reducing the amount drawn from its authorized reserve fund. Funds in the reserve (currently $204,000) would be kept within the maximum permitted by the order.

The Committee reviewed and unanimously recommended 2008 expenditures of $712,000 which included increases in administrative expenses, and compliance programs. Prior to arriving at this budget, the Committee considered information from various sources, including the Executive Committee and the Research Subcommittee. Alternative expenditure levels were discussed by the Committee based upon the relative value of various research and promotion projects to the Vidalia onion industry. The Committee also discussed keeping the current $0.10 per 40-pound bag or equivalent assessment rate. However, keeping the assessment rate at $0.10 per 40-pound bag would not allow the Committee to fund many of the proposed promotional projects. The assessment rate of $0.13 per 40-pound container of assessable Vidalia onions was then determined by considering available reserves, and dividing the total recommended budget by the quantity of assessable Vidalia onions, estimated at 4,300,000 40-pound containers for the 2008 fiscal year. This is approximately $138,000 below the anticipated expenses, which the Committee determined to be acceptable.

A review of historical information and preliminary information pertaining to the upcoming fiscal period indicates that the grower price for the 2008 season could range between $10.00 and $34.00 per 40-pound container of Vidalia onions. Therefore, the estimated assessment revenue for the 2008 fiscal period as a percentage of total grower revenue could range between .4 and 1 percent.

This action would increase the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs would be offset by the benefits derived by the operation of the marketing order. In addition, the Committee's meeting was widely publicized throughout the Vidalia onion industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the December 13, 2007, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and informational impacts of this action on small businesses.

This proposed rule would impose no additional reporting or recordkeeping requirements on either small or large Vidalia onion handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab.html*. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 30-day comment period is provided to allow interested persons to respond to this proposed rule. Thirty days is deemed appropriate because: (1) The 2008 fiscal period began on January 1, 2008, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable Vidalia onions handled during such fiscal period; (2) the Committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis; and (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting and is similar to other

assessment rate actions issued in past years.

List of Subjects in 7 CFR Part 955

Onions, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 955 is proposed to be amended as follows:

PART 955—VIDALIA ONIONS GROWN IN GEORGIA

1. The authority citation for 7 CFR part 955 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 955.209 is revised to read as follows:

§ 955.209 Assessment rate.

On and after January 1, 2008, an assessment rate of $0.13 per 40-pound carton or equivalent is established for Vidalia onions.

Dated: March 12, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–5358 Filed 3–17–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 2 and 3

[Docket No. 99–014–3]

RIN 0579–AC41

Animal Welfare; Climatic and Environmental Conditions for Transportation of Warmblooded Animals Other Than Marine Mammals

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We are reopening the comment period for our proposed rule that would remove the current ambient temperature requirements in the Animal Welfare Act regulations for various stages in the transportation of live animals other than marine mammals. The proposal would replace those requirements with a single performance standard for climatic and environmental conditions during their transportation. This action will allow interested persons additional time to prepare and submit comments.

DATES: We will consider all comments that we receive on or before April 17, 2008.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2006-0150* to submit or view comments and to view supporting and related materials available electronically.

- *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. 99–014–2, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 99–014–2.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Jerry D. DePoyster, Veterinary Medical Officer, Animal Care, APHIS, 4700 River Road Unit 84, Riverdale, MD 20737–1234; (301) 734–7586.

SUPPLEMENTARY INFORMATION: On January 3, 2008, we published in the **Federal Register** (73 FR 413–420, Docket No. 99–014–2) a proposal to remove the current ambient temperature requirements in the Animal Welfare Act regulations for various stages in the transportation of live animals other than marine mammals. The proposal would replace those requirements with a single performance standard under which the animals would be transported under climatic and environmental conditions that are appropriate for their welfare.

Comments on the proposed rule were required to be received on or before March 3, 2008. We are reopening the comment period on Docket No. 99–014–2 for an additional 30 days. This action will allow interested persons additional time to prepare and submit comments. We will also consider all comments received between March 4, 2008, and the date of this notice.

Authority: 7 U.S.C. 2131–2159; 7 CFR 2.22, 2.80, and 371.7.

Done in Washington, DC, this 12th day of March 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–5394 Filed 3–17–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0301; Directorate Identifier 2007–NM–284–AD]

RIN 2120–AA64

Airworthiness Directives; Dassault Model Falcon 2000EX and 900EX Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

On early FALCON airplanes featuring the EASy cockpit, a new oxygen controller has been installed. An internal review has determined that the passenger oxygen mask boxes do not fit this new controller. In OVERRIDE mode, that is to say, when the internal pressure reducer is by-passed, oxygen (O_2) flow is nominal, while in NORMAL mode O_2 flow is reduced by half compared to what it should be.

Consequently, in NORMAL mode the minimum mass flow of supplemental O2 for each passenger, as required by Certification Specifications, is no longer met. This could lead to passenger incommodation due to insufficient body oxygenation.

The unsafe condition is incorrectly fitted passenger oxygen mask boxes for the new controllers, which could result in incapacitation of passengers due to insufficient oxygen in the event of rapid depressurization of the airplane when the controller is in NORMAL mode. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by April 17, 2008.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–0301; Directorate Identifier 2007–NM–284–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued Airworthiness Directive 2007–0073, dated March 22, 2007 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> On early FALCON airplanes featuring the EASy cockpit, a new oxygen controller has been installed. An internal review has determined that the passenger oxygen mask boxes do not fit this new controller. In OVERRIDE mode, that is to say, when the internal pressure reducer is by-passed, oxygen (O_2) flow is nominal, while in NORMAL mode O_2 flow is reduced by half compared to what it should be.
>
> Consequently, in NORMAL mode the minimum mass flow of supplemental O_2 for each passenger, as required by Certification Specifications, is no longer met. This could lead to passenger incommodation due to insufficient body oxygenation.
>
> The purpose of this Airworthiness Directive (AD) is to mandate the replacement of the passenger oxygen mask boxes by new-design ones [boxes] adapted to the controller.

The unsafe condition is incorrectly fitted passenger oxygen mask boxes for the new controllers, which could result in incapacitation of passengers due to insufficient oxygen in the event of rapid depressurization of the airplane when the controller is in NORMAL mode. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Dassault has issued Service Bulletins F900EX–257 and F2000EX–61, both Revision 1, both dated March 22, 2007. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 27 products of U.S. registry. We also estimate that it would take about 16 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $34,560, or $1,280 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Dassault Aviation: Docket No. FAA–2008–0301; Directorate Identifier 2007–NM–284–AD.

Comments Due Date

(a) We must receive comments by April 17, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Dassault Model Falcon 2000EX and 900EX airplanes, certificated in any category, as identified in paragraphs (c)(1) and (c)(2) of this AD.

(1) Falcon 900EX airplanes, serial number (S/N) 120 through 146 inclusive, on which Dassault Service Bulletin F900EX–257 has not been implemented.

(2) Falcon 2000EX airplanes, S/N 28 through 55 inclusive, on which Dassault Service Bulletin F2000EX–61 has not been implemented.

Subject

(d) Air Transport Association (ATA) of America Code 35: Oxygen.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

On early FALCON airplanes featuring the EASy cockpit, a new oxygen controller has been installed. An internal review has determined that the passenger oxygen mask boxes do not fit this new controller. In OVERRIDE mode, that is to say, when the internal pressure reducer is by-passed, oxygen (O_2) flow is nominal, while in NORMAL mode O_2 flow is reduced by half compared to what it should be.

Consequently, in NORMAL mode the minimum mass flow of supplemental O_2 for each passenger, as required by Certification Specifications, is no longer met. This could lead to passenger incommodation due to insufficient body oxygenation.

The purpose of this Airworthiness Directive (AD) is to mandate the replacement of the passenger oxygen mask boxes by new-designed ones [boxes] adapted to the controller.

The unsafe condition is incorrectly fitted passenger oxygen mask boxes for the new controllers, which could result in incapacitation of passengers due to insufficient oxygen in the event of rapid depressurization of the airplane when the controller is in NORMAL mode.

Actions and Compliance

(f) Unless already done do the following actions:

(1) Within 15 months after the effective date of this AD, replace the passenger oxygen mask boxes in accordance with Dassault Service Bulletins F900EX–257 or F2000EX–61, both Revision 1, both dated March 22, 2007, as applicable.

(2) Actions done before the effective date of this AD in accordance with Dassault Service Bulletins F900EX–257 dated March 15, 2006, and F2000EX–61, dated March 22, 2006; are acceptable for compliance with the corresponding actions of this AD.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI EASA Airworthiness Directive 2007–0073, dated March 22, 2007, and Dassault Service Bulletins F900EX–257 and F2000EX–61, both Revision 1, both dated March 22, 2007, for related information.

Issued in Renton, Washington, on March 9, 2008.

Stephen P. Boyd,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–5371 Filed 3–17–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0302; Directorate Identifier 2007–NM–323–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 767–200, –300, and –400ER Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) that applies to certain Boeing Model 767–200, –300, and –400ER series airplanes. The existing AD currently requires an inspection to determine if the door-mounted escape slide/rafts have certain part numbers. For those door-mounted escape slide/rafts having certain part numbers, the existing AD also currently requires an inspection for excessive tension of the firing cable, and procedures for providing slack in the firing cable or rerouting the firing cable if necessary. For certain airplanes, this proposed AD would require a review of the airplane maintenance records to determine if a certain service bulletin has been incorporated, or an inspection to determine if certain door-mounted escape slide/rafts are installed. This proposed AD would also require modification of certain escape slide/rafts. This proposed AD results from reports of uncommanded inflation inside the airplane of a door-mounted escape slide/raft located in the passenger compartment. We are

proposing this AD to prevent injury to maintenance personnel, passengers, and crew during otherwise normal operating conditions and to prevent interference with evacuation of the airplane during an emergency, due to uncommanded inflation of a door-mounted escape slide/raft.

DATES: We must receive comments on this proposed AD by May 2, 2008.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Keith Ladderud, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6435; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–0302; Directorate Identifier 2007–NM–323–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On June 7, 2005, we issued AD 2005–12–14, amendment 39–14130 (70 FR 34638, June 15, 2005), for certain Boeing Model 767–200, –300, and –400ER series airplanes. That AD requires an inspection to determine if the door-mounted escape slide/rafts have certain part numbers. For those door-mounted escape slide/rafts having certain part numbers, that AD also requires an inspection for excessive tension of the firing cable, and procedures for providing slack in the firing cable or rerouting the firing cable if necessary. That AD resulted from reports of uncommanded inflation inside the airplane of a door-mounted escape slide/raft located in the passenger compartment. We issued that AD to prevent injury to maintenance personnel, passengers, and crew during otherwise normal operating conditions and to prevent interference with evacuation of the airplane during an emergency, due to uncommanded inflation of a door-mounted escape slide/raft.

Actions Since Existing AD Was Issued

The preamble to AD 2005–12–14 specified that we considered the requirements ''interim action'' and that the manufacturer was developing a modification to address the unsafe condition. That AD explained that we might consider further rulemaking if a modification is developed, approved, and available. The manufacturer now has developed such a modification, and we have determined that further rulemaking is indeed necessary; this proposed AD follows from that determination. Boeing has issued Alert Service Bulletin 767–25A0395, Revision 1, dated January 25, 2007, to provide instructions for accomplishing the modification.

Relevant Service Information

We have reviewed Revision 1 of Boeing Alert Service Bulletin 767–25A0395. For Group 1 and 2 airplanes, the service bulletin describes procedures for doing either a records verification to determine if Boeing Service Bulletin 767–25–0266 has been incorporated, or a general visual inspection to determine if any door-mounted escape slide/raft having part number (P/N) 5A3294–1, 5A3294–2, 5A3295–1, or 5A3295–3 is installed. For Group 1 and 2 airplanes, the service bulletin also describes procedures for doing the corrective action, which is to modify the escape slide/rafts, if Boeing Service Bulletin 767–25–0266 has been incorporated or if P/N 5A3294–1, 5A3294–2, 5A3295–1, or 5A3295–3 is installed. For Group 3, 4, 5 and 6 airplanes, the service bulletin describes procedures for modifying the door-mounted escape slide/rafts. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition.

The service bulletin refers to Goodrich Service Bulletin 5A3294/5A3295–25–362, dated July 25, 2006, as an additional source of service information for modifying a door-mounted escape slide/raft by replacing the firing cable with a longer cable and testing the regulator valve of the inflation trigger system for the door-mounted escape slide/raft.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to develop on other products of the same type design. For this reason, we are proposing this AD, which would supersede AD 2005–12–14 and would retain the requirements of the existing AD. This proposed AD would also require accomplishing the actions specified in the service information described previously.

Costs of Compliance

There are about 1,225 airplanes of the affected design in the worldwide fleet. This proposed AD would affect about 355 airplanes of U.S. registry.

The actions that are required by AD 2005–12–14 and retained in this proposed AD take up to about 6 work hours per airplane, at an average labor rate of $80 per work hour. Based on these figures, the estimated cost of the currently required actions for U.S. operators is $170,400, or is $480 per airplane.

The new proposed actions would take up to about 6 work hours per airplane, at an average labor rate of $80 per work hour. The parts manufacturer states that it will supply the required parts to operators at no cost. Based on these figures, the estimated cost of the new

actions specified in this proposed AD for U.S. operators is $170,400, or $480 per airplane.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–14130 (70 FR 34638, June 15, 2005) and adding the following new airworthiness directive (AD):

Boeing: Docket No. FAA–2008–0302; Directorate Identifier 2007–NM–323–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by May 2, 2008.

Affected ADs

(b) This AD supersedes AD 2005–12–14.

Applicability

(c) This AD applies to Boeing Model 767–200, -300, and -400ER series airplanes, certificated in any category, equipped with door-mounted escape slide/rafts.

Unsafe Condition

(d) This AD results from reports of uncommanded inflation inside the airplane of a door-mounted escape slide/raft located in the passenger compartment. We are issuing this AD to prevent injury to maintenance personnel, passengers, and crew during otherwise normal operating conditions and to prevent interference with evacuation of the airplane during an emergency, due to uncommanded inflation of a door-mounted escape slide/raft.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Restatement of Requirements of AD 2005–12–14

Inspection for Part Numbers (P/Ns)

(f) Within 30 days after June 30, 2005 (the effective date of AD 2005–12–14), accomplish the actions in either paragraph (f)(1) or (f)(2) of this AD.

(1) Perform a one-time inspection to determine if any Goodrich door-mounted escape slide/raft having P/N 5A3294–1, 5A3294–2, 5A3295–1, or 5A3295–3 is installed. If no slide/raft having any of those part numbers is installed, no further action is required by this paragraph, except for the requirements of paragraph (j) of this AD.

(2) Perform a one-time check of the airplane maintenance records to determine if any Goodrich door-mounted escape slide/raft having P/N 5A3294–1, 5A3294–2, 5A3295–1, or 5A3295–3 is installed. If it can be conclusively determined from the airplane maintenance records that no slide/raft having any of those part numbers is installed, no further action is required by this AD, except for the requirements of paragraph (j) of this AD.

Inspection for Excessive Tension on the Firing Cable

(g) If any door-mounted escape slide/raft with any part number specified in paragraph (f) of this AD is installed: Within 30 days after June 30, 2005, perform a tension check on the firing cable of the slide/raft, in accordance with Boeing Alert Service Bulletin 767–25A0390, dated May 13, 2005. If no excessive tension is detected, no further action is required by this AD, except for the requirements of paragraph (j) of this AD.

Note 1: Boeing Alert Service Bulletin 767–25A0390, dated May 13, 2005, references Goodrich Alert Service Bulletin 5A3294/5A3295–25A356, dated May 11, 2005, as an additional source of service information.

Corrective Action for Excessive Tension on the Firing Cable

(h) If any excessive tension of the firing cable is detected, before further flight, do the applicable corrective actions in accordance with the Boeing Alert Service Bulletin 767–25A0390, dated May 13, 2005.

Previous Accomplishment

(i) Inspections of the firing cables for excessive tension in accordance with Boeing Alert Service Bulletin 767–25A0390, dated May 13, 2005, that were accomplished before June 30, 2005, are acceptable for compliance with the requirements of paragraph (g) of this AD, provided that any applicable corrective action was completed.

Parts Installation

(j) As of June 30, 2005, no person may install on any airplane any Goodrich door-mounted escape slide/raft having P/N 5A3294–1, 5A3294–2, 5A3295–1, or 5A3295–3, unless the tension of the firing cable has been checked and the applicable corrective action completed in accordance with Boeing Alert Service Bulletin 767–25A0390, dated May 13, 2005, or the escape slide/raft has been repacked in accordance with Goodrich Packing Instructions, Evacuation Slide/Raft, Document 501636, Revision G, dated May 16, 2005; Goodrich Packing Instructions, Evacuation Slide/Raft, LH, Document 501637, Revision E, dated May 16, 2005; or Goodrich Packing Instructions, Evacuation Slide/Raft, RH, Document 501638, Revision D, dated May 16, 2005; as applicable.

New Requirements of This AD

Modification

(k) For airplanes identified in Boeing Alert Service Bulletin 767–25A0395, Revision 1, dated January 25, 2007: Within 36 months after the effective date of this AD, do the applicable actions specified in paragraph (k)(1) or (k)(2) of this AD, by accomplishing all of the applicable actions specified in the service bulletin.

(1) For Group 1 and 2 airplanes as identified in the service bulletin: Review the airplane maintenance records to determine if Boeing Service Bulletin 767–25–0266 has been incorporated, or do a general visual inspection to determine if any door-mounted escape slide/raft having P/N 5A3294–1, 5A3294–2, 5A3295–1, or 5A3295–3 is installed, and before further flight do all the

applicable corrective actions. Doing the inspection before the effective date of this AD in accordance with paragraph (f)(1) of this AD is acceptable for compliance with the inspection specified in this paragraph.

(2) For Group 3, 4, 5, and 6 airplanes as identified in the service bulletin: Modify the escape slide/rafts.

Note 2: Boeing Alert Service Bulletin 767–25A0395, Revision 1, refers to Goodrich Service Bulletin 5A3294/5A3295–25–362, dated July 25, 2006, as an additional source of service information for modifying a door-mounted escape slide/raft.

Alternative Methods of Compliance (AMOCs)

(l)(1) The Manager, Seattle Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(3) AMOCs approved previously in accordance with AD 2005–12–14, amendment 39–14130, are approved as AMOCs for the corresponding provisions of paragraphs (f), (g), (h), (i), and (j) of this AD.

Issued in Renton, Washington, on March 9, 2008.

Stephen P. Boyd,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–5373 Filed 3–17–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0131; Airspace Docket 08–AEA–12]

Proposed Establishment of Class E Airspace; Philippi, WV

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to establish Class E airspace at Philippi, WV. Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures (SIAP) Runways (RWY) 08–26 has been developed for Philippi/Barbour County Regional Airport. As a result, controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to contain the SIAP and for Instrument Flight Rule (IFR) operations at Philippi/Barbour County Regional Airport. The operating status of the airport will change from Visual Flight Rules (VFR) to include IFR operations concurrent with the publication of the SIAP. This action enhances the safety and airspace management of Philippi/Barbour County Regional Airport.

DATES: Comments must be received on or before May 2, 2008.

ADDRESSES: Send comments on this proposal to: U. S. Department of Transportation, Docket Operations, West Building, Ground Floor, Room W12–140, 1200 New Jersey Ave., SE., Washington, DC 20590–0001; Telephone: 1–800–647–5527; Fax: 202–493–2251. You must identify the docket number FAA–2008–0131; Airspace Docket 08–AEA–12, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov*.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Avenue, College Park, Georgia 30337.

FOR FURTHER INFORMATION CONTACT: Daryl Daniels, Airspace Specialist, System Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5581.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal.

Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Those wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2008–0131; Airspace Docket No. 08–AEA–12.'' The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov* or the Federal Register's Web page at *http://www.gpoaccess.gov/fr/index.html*. Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to Part 71 of the Code of Federal Regulations (14 CFR part 71) to establish Class E airspace at Philippi, WV. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface of the Earth are published in Paragraph 6005 of FAA Order 7400.9R, signed August 15, 2007, and effective September 15, 2007, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation, as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a

significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it proposes to establish Class E airspace at Philippi, WV.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9R, Airspace Designations and Reporting Points, signed August 15, 2007, and effective September 15, 2007, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth

* * * * *

AEA WV E5 Philippi, WV [New]

Philippi/Barbour County Regional Airport, WV
(Lat. 39°09′58″ N., long. 80°03′45″ W.)

That airspace extending upward from 700 feet above the surface of the Earth within a 6.6-mile radius of Philippi/Barbour County Regional Airport.

* * * * *

Issued in College Park, Georgia, on February 25, 2008.

Mark D. Ward,

Manager, System Support Group Eastern Service Center.

[FR Doc. E8–5170 Filed 3–17–08; 8:45 am]

BILLING CODE 4910–13–M

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 404

[Docket No. SSA 2007–0082]

RIN 0960–AG67

Revised Medical Criteria for Evaluating HIV Infection

AGENCY: Social Security Administration.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: In a separate notice in today's edition of the **Federal Register**, we are publishing final rules revising the criteria we use to evaluate immune system disorders, found in sections 14.00 and 114.00 of the Listing of Impairments in appendix 1 to subpart P of part 404 of our regulations (the listings). In those rules, we indicate that we will issue an Advance Notice of Proposed Rulemaking (ANPRM) inviting public comments on how we might update and revise listings 14.08 and 114.08, our listings for evaluating HIV infection. We are now requesting your comments and suggestions about possible revisions to those listings.

After we have considered your comments and suggestions, other information about advances in medical knowledge, treatment, and methods of evaluating HIV infection, and our program experience using the current listings, we will determine whether we should revise listings 14.08 and 114.08. If we propose specific revisions to the listings, we will publish a Notice of Proposed Rulemaking (NPRM) in the **Federal Register**.

DATES: To be sure that your comments are considered, we must receive them no later than May 19, 2008.

ADDRESSES: You may submit comments by any of the following methods. Regardless of which method you choose, to ensure that we can associate your comments with the correct regulation for consideration, you must state that your comments refer to Docket No. SSA–2007–0082:

- Federal eRulemaking Portal at *http://www.regulations.gov.* (This is the preferred method for submitting your comments.) In the Search Documents section, select ''Social Security Administration'' from the agency drop-down menu, then click ''submit.'' In the Docket ID Column, locate SSA–2007–0082 and then click ''Add Comments'' in the ''Comments Add/Due By'' column.
- Telefax to (410) 966–2830.
- Letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, Maryland 21235–7703.
- Deliver your comments to the Office of Regulations, Social Security Administration, 922 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, between 8 a.m. and 4:30 p.m. on regular business days. Comments are posted on the Federal eRulemaking portal, or you may inspect them on regular business days by making arrangements with the contact person shown in this preamble.

FOR FURTHER INFORMATION CONTACT: Paul Scott, Office of Compassionate Allowances and Listings Improvement, Social Security Administration, 4422 Annex Building, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 966–1192, for information about this notice. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Electronic Version

The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html.*

What is the purpose of this ANPRM?

The purpose of this ANPRM is to give you an opportunity to send us comments and suggestions on whether and how we might update and revise listings 14.08 and 114.08, our listings for evaluating HIV infection. In a separate notice in today's edition of the **Federal Register**, we are publishing final rules revising the criteria we use to evaluate immune system disorders, found in sections 14.00 and 114.00 of the listings. We proposed changes to listings 14.08 and 114.08 when we published our NPRM on August 4, 2006 (71 FR 44432 (2006)), and we received some public comments suggesting changes to those listings. Although the final rules that we are are publishing today include changes to listings 14.08 and 114.08, the criteria in these listings are not substantively different from the criteria in our proposed rules and our current rules. We have decided to publish this ANPRM partly because we need additional information and partly because we believe that some of the

changes suggested in the public comments were too extensive to include in a final rule without giving the public a chance to comment on them.

Which rules are we inviting comments about?

We are considering whether and how to update and revise listings 14.08 and 114.08. You can find the revised rules for listing sections 14.00 and 114.00 in a separate notice that we are publishing in today's edition of the **Federal Register**.

Who should send us comments and suggestions?

We invite comments and suggestions from anyone who has an interest in the rules we use to evaluate claims for benefits filed by persons who have HIV infection. We are interested in getting comments and suggestions from persons who apply for or receive benefits from us, members of the general public, advocates and organizations who represent people who have HIV infection, State agencies that make disability determinations for us, experts in the evaluation of HIV infection, and researchers.

What should you comment about?

We are specifically interested in any comments and suggestions you have on how we might update and revise listings 14.08 and 114.08. The issues we want your comments to address are:

- Should we add, change, or remove any of the criteria in listings 14.08 and 114.08?
- If so, what revisions do you think we should make?

Will we respond to your comments from this notice?

We will not respond directly to comments you send us in response to this notice. However, after we consider your comments along with other information, such as medical research and other information about advances in medical knowledge, treatment, and methods of evaluating HIV infection and our program experience, we will decide whether and how to revise listings 14.08 and 114.08. If we propose revisions to those listings, we will publish an NPRM in the **Federal Register**. In accordance with the usual rulemaking procedures we follow, if we publish an NPRM, you will have a chance to comment on any proposed revisions to listings 14.08 and 114.08, and we will summarize and respond to the significant comments on the NPRM in the preamble to any final rules.

Other Information

Who can get disability benefits?

Under title II of the Social Security Act (the Act), we provide for the payment of disability benefits if you are disabled and belong to one of the following three groups:

- Workers insured under the Act,
- Children of insured workers, and
- Widows, widowers, and surviving divorced spouses (see § 404.336) of insured workers.

Under title XVI of the Act, we provide for Supplemental Security Income (SSI) payments on the basis of disability if you are disabled and have limited income and resources.

How do we define disability?

Under both the title II and title XVI programs, disability must be the result of any medically determinable physical or mental impairment or combination of impairments that is expected to result in death or which has lasted or is expected to last for a continuous period of at least 12 months. Our definitions of disability are shown in the following table:

If you file a claim under . . .	And you are . . .	Disability means you have a medically determinable impairment(s) as described above that results in . . .
title II	An adult or child	the inability to do any substantial gainful activity (SGA).
title XVI	An individual age 18 or older	the inability to do any SGA.
title XVI	An individual under age 18	marked and severe functional limitations.

How do we decide whether you are disabled?

If you are applying for benefits under title II of the Act, or if you are an adult applying for payments under title XVI of the Act, we use a five-step ''sequential evaluation process'' to decide whether you are disabled. We describe this five-step process in our regulations at §§ 404.1520 and 416.920. We follow the five steps in order and stop as soon as we can make a determination or decision. The steps are:

1. Are you working, and is the work you are doing SGA? If you are working and the work you are doing is SGA, we will find that you are not disabled, regardless of your medical condition or your age, education, and work experience. If you are not, we will go on to step 2.

2. Do you have a ''severe'' impairment? If you do not have an impairment or combination of impairments that significantly limits your physical or mental ability to do basic work activities, we will find that you are not disabled. If you do, we will go on to step 3.

3. Do you have an impairment(s) that meets or medically equals the severity of an impairment in the listings? If you do, and the impairment(s) meets the duration requirement, we will find that you are disabled. If you do not, we will go to step 4.

4. Do you have the residual functional capacity (RFC) to do your past relevant work? If you do, we will find that you are not disabled. If you do not, we will go on to step 5.

5. Does your impairment(s) prevent you from doing any other work that exists in significant numbers in the national economy, considering your RFC, age, education, and work experience? If it does, and it meets the duration requirement, we will find that you are disabled. If it does not, we will find that you are not disabled.

We use a different sequential evaluation process for children who apply for payments based on disability under SSI. If you are already receiving benefits, we also use a different sequential evaluation process when we decide whether your disability continues. See §§ 404.1594, 416.924, 416.994, and 416.994a of our regulations. However, all of these processes include steps at which we consider whether your impairment(s) meets or medically equals one of our listings.

What are the listings?

The listings are examples of impairments that we consider severe enough to prevent you as an adult from doing any gainful activity. If you are a child seeking SSI payments based on disability, the listings describe impairments that we consider severe enough to result in marked and severe functional limitations. Although the listings are contained only in appendix

1 to subpart P of part 404 of our regulations, we incorporate them by reference in the SSI program in § 416.925 of our regulations, and apply them to claims under both title II and title XVI of the Act.

How do we use the listings?

The listings are in two parts. There are listings for adults (part A) and for children (part B). If you are an individual age 18 or over, we apply the listings in part A when we assess your claim, and we do not use the listings in part B.

If you are an individual under age 18, we first use the criteria in part B of the listings. If the criteria in part B do not apply, we may use the criteria in part A when those criteria give appropriate consideration to the effects of the impairment(s) in children. (See §§ 404.1525 and 416.925.)

If your impairment(s) does not meet any listing, we will also consider whether it medically equals any listing, that is, whether it is as medically severe as an impairment in the listings. (See §§ 404.1526 and 416.926.)

What if you do not have an impairment(s) that meets or medically equals a listing?

We use the listings only to decide that you are disabled or that you are still disabled. We will not deny your claim or decide that you no longer qualify for benefits because your impairment(s) does not meet or medically equal a listing. If you have a severe impairment(s) that does not meet or medically equal any listing, we may still find you disabled based on other rules in the ''sequential evaluation process.'' Likewise, we will not decide that your disability has ended only because your impairment(s) no longer meets or medically equals a listing.

List of Subjects in 20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

Dated: January 15, 2008.

Michael J. Astrue,

Commissioner of Social Security.

[FR Doc. E8–5022 Filed 3–17–08; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 516

[Docket No. 2008N–0011]

RIN 0910–AG03

Defining Small Number of Animals for Minor Use Designation

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The designation provision of the Minor Use and Minor Species Animal Health Act of 2004 (MUMS act) provides incentives to animal drug sponsors to encourage drug development and approval for minor species and for minor uses in major animal species. Congress provided a statutory definition of ''minor use'' that relied on the phrase ''small number of animals'' to characterize such use. At this time, FDA is proposing to amend the implementing regulations of the MUMS act. In response to Congress' charge to the agency to further define minor use, this amendment proposes a specific ''small number of animals'' for each of the seven major animal species to be used in determining whether any particular intended use in a major species is a minor use.

DATES: Submit written or electronic comments on the proposed rule by July 16, 2008. Submit comments regarding information collection by April 17, 2008 to OMB (see **ADDRESSES**).

ADDRESSES: You may submit comments, identified by Docket No. 2008N–0011 and RIN number 0910–AG03, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

Written Submissions

Submit written submissions in the following ways:

- FAX: 301–827–6870.
- Mail/Hand delivery/Courier [For paper, disk, or CD–ROM submissions]: Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

To ensure more timely processing of comments, FDA is no longer accepting comments submitted to the agency by e-mail. FDA encourages you to continue to submit electronic comments by using the Federal eRulemaking Portal or the agency Web site, as described previously, in the **ADDRESSES** portion of this document under *Electronic Submissions*.

Instructions: All submissions received must include the agency name and Docket No(s). and Regulatory Information Number (RIN) (if a RIN number has been assigned) for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov*, including any personal information provided. For additional information on submitting comments, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number(s), found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Information Collection Provisions: Submit written comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB).To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Margaret Oeller, Center for Veterinary Medicine (HFV–50), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–9005, e-mail: *Margaret.Oeller@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Definition of Minor Use

The MUMS act (Public Law 108–282) amended the Federal Food, Drug, and Cosmetic Act (the act) to provide incentives for the development of new animal drugs for use in minor animal species and for minor uses in major animal species. The MUMS act defines ''minor use'' as ''the intended use of a drug in a major species for an indication that occurs infrequently and in only a small number of animals or in limited geographical areas and in only a small number of animals annually'' (section 201(pp) of the act (21 U.S.C. 321(pp)). The major species are cattle, horses, swine, chickens, turkeys, dogs, and cats (21 U.S.C. 321(nn)).

Prior to enactment of the MUMS act, FDA defined minor use by regulation to

mean, ''the use of: * * * (b) new animal drugs in any animal species for the control of a disease that (*1*) occurs infrequently or (*2*) occurs in limited geographical areas'' (48 FR 1922; January 14, 1983 (former § 514.1(d)(1) (21 CFR 514.1(d)(1))). The MUMS act narrowed this definition by restricting it to uses ''in only a small number of animals annually'' (21 U.S.C. 321(pp)).

The legislative history of the MUMS act indicates that Congress intended that FDA further define minor use in a major species by regulation and that it do so ''by evaluating, in the context of the drug development process, whether the incidence of a disease or condition occurs so infrequently that the sponsor of a drug intended for such use has no reasonable expectation of its sales generating sufficient revenues to offset the cost of development'' (S. Rpt. 108–226 at 12–13). The legislative history also notes that the new statutory definition for minor use ''incorporates the existing definition in the Code of Federal Regulations (21 CFR 514.1(d)(1)) with a further limitation to small numbers to assure that such intended uses will not be extended to a wider use'' (S. Rept. 108–226 at 12–13).

Therefore, while the MUMS act establishes incentives for animal drug development for minor uses, it also limits the availability of those incentives in order to prevent them from stimulating ''wider use'' of new animal drugs marketed under the MUMS act provisions.

Consistent with these dual aims of stimulating animal drug development for minor uses in major species and at the same time preventing ''wider use'' of such new animal drugs, the agency is proposing to define the term ''small number of animals'' for each major species that would constitute the upper limit of a ''minor use'' under the MUMS act. In keeping with the goal of creating a drug development incentive, the proposed definition would establish the number of animals eligible to be treated annually based on the number of animals that represents a drug market value that (relative to drug development costs) would not be likely to be pursued in the absence of the MUMS act incentives. Furthermore, as explained in the following section I.B of this document, FDA believes it is necessary to establish ''small number of animals'' differently for companion animals than for food-producing animals.

B. Companion Animals vs. Food-Producing Animals

The issue of considering companion animals and food-producing animals separately in the context of establishing small numbers of animals was raised in comments on the MUMS designation proposed rule (70 FR 56394; September 27, 2005).

One of the comments stated that the agency and sponsors would be best served by separating requirements for companion and food-producing animals because ''this separation would provide information clearly focused on the information necessary for each group'' (Ref. 1).

A second comment requested that the agency ''consider separation of the requirements for companion animals from that for food-producing animals, as it is difficult to generalize across the two categories'' (Ref. 2).

A third comment urged FDA to establish different sets of criteria for major species of food-producing animals and companion animals because ''economic criteria play differently into decisions to administer drugs to these two types of animals'' (Ref. 3).

The agency generally agrees that food-producing and companion animals should be considered separately with respect to establishing small numbers, and notes that one of the principal reasons for considering food-producing and companion animals differently is that the decision to treat food-producing animals is almost exclusively based on an assessment of the economic value of the animals at the time treatment is needed. In addition, very often this decision involves administering a drug to all animals in a herd or flock, not just those showing signs of disease. Because the decision to administer a drug may be made more conservatively than for companion animals but, once made, often involves the exposure of more animals, there is no clear basis for estimating the likelihood of drug administration to individual food-producing animals.

Other factors to consider are that there are much larger absolute numbers of food-producing animals than companion animals (in the case of chickens, approximately 9 billion) (Ref. 4), and that food-producing animals tend to be geographically concentrated to a greater extent than companion animals (Ref. 5). Each of these factors supports establishing ''small numbers of animals'' for companion animals differently than ''small numbers of animals'' for food-producing animals.

When FDA proposed regulations to implement the designation provision of the MUMS act, the preamble contained considerable discussion regarding the definition of ''minor use,'' including the issues surrounding the use of the phrase ''small number of animals'' in the statutory definition of minor use. (See section II.A.2 Minor Use of 70 FR 56394 at 56395.) Ultimately, the agency indicated that it did not have enough information to propose a ''small number of animals'' for each major species at that time, but indicated its intention to do so in the future, and requested information to facilitate that process.

In response to this request, FDA received four comments concerning ''small numbers of animals'' and minor use which the agency responded to in the preamble of the MUMS designation final rule. (See section III.B of 72 FR 41010 at 41013.) These comments were general in nature. This may be attributed, in part, to animal drug sponsors considering specific information regarding the cost of drug development, and the process by which they make decisions to pursue drug development, to be, ''for the most part, confidential'' (Ref. 2). However, the agency was able to obtain information regarding average animal drug development costs as well as typical drug treatment costs for the seven major species. This information was obtained by contracting with a source with significant knowledge of the animal pharmaceutical industry that was also capable of collecting information from a large number of other sources (Ref. 6). From this source, the agency was also able to obtain general information regarding the incidence or prevalence of a large number of diseases and conditions of dogs, cats, and horses. Similar information regarding disease incidence or prevalence was not readily available for major food-producing species.

In fact, in spite of repeated agency requests to the animal health industry to identify potential conditions of food-producing animals that might qualify as minor uses, very few conditions have been suggested; for example babesiosis in cattle.

Therefore, following a careful analysis of the information noted previously, and based on early experience making designation determinations on a case-by-case basis, the agency is now proposing the establishment of a ''small number of animals'' for each of the seven major animal species.

II. Proposed Regulation

A. ''Small Numbers'' for Major Species of Companion Animals

1. The Value of Exclusivity

There are three drug development incentives established by the Orphan Drug Act (Public Law 97–414) that are associated with human orphan product development: Seven years of exclusive marketing, an approximately 50 percent

reduction in development costs via tax reductions, and eligibility for grants to support development costs. Designated MUMS drugs are currently eligible for 7 years of exclusive marketing (section 573(c) of the act) (21 U.S.C. 360ccc–2(c)), and eventually will be eligible for grants (section 102(b)(8) of the MUMS act). A tax incentive for animal drug development was not included in this legislation. The designation provisions of the MUMS act went into effect upon enactment. Therefore, FDA must define ''small numbers'' as soon as possible.

Consistent with the intent and the language of the MUMS act, ''small number'' for each major companion animal species (horses, dogs, and cats) should represent a drug market value that (relative to drug development costs) would not be likely to be pursued in the absence of the MUMS act incentives. While incentives in addition to marketing exclusivity, such as the MUMS grant provisions, should they become available, would be expected to increase the likelihood of developing drugs for markets smaller than the proposed small number thresholds, the increase in incentives would not alter the small numbers themselves.

To estimate the value of 7 years of exclusive marketing rights, we have examined the marketing exclusivity established by the Generic Animal Drug and Patent Term Restoration Act (GADPTRA) (Public Law 100–670) as a benchmark for MUMS exclusivity. GADPTRA provides 5 years of exclusivity for the first-time approval of a drug in animals (section 512(c)(2)(F) of the act) (21 U.S.C. 360b(c)(2)(F)). In enacting GADPTRA, Congress indicated that it viewed this term of exclusivity as a sufficient return on investment prior to generic competition to provide an incentive for the pioneer sponsor to develop a drug. Together with information regarding average animal drug development costs obtained by the agency (Ref. 6), we can calculate the relative value of the 5-year GADPTRA incentive. A basic principle of animal drug product development embedded in these data is that a sponsor will generally need to perceive a market potential in the third year of marketing equal to the development cost of the product in order to pursue development (Ref. 6). This third year market is apparently considered the mature market for the drug or, in industry parlance, the ''going'' market (Ref. 6) and can serve as a basis for calculating the entire market potential of a drug prior to generic competition.

As a hypothetical example, for a drug with a $15,000,000 ($15M) development cost for a particular intended use, the third year market would need to be perceived to be $15M in order to support product development. In this example, we project a ramp up to this ''going'' market value of $5M in the first year of marketing and $10M in the second. This means that under the 5-year term of exclusivity provided by GADPTRA, for a first-time approval of a drug in animals, a market prior to generic competition sufficient to justify pioneer sponsor investment relative to a $15M investment is $60M (i.e., $5M in year 1 + 10M in year 2 + 15M in year 3 + 15M in year 4 + $15M in year 5).

There may be a number of ways of interpreting the value of the additional 2 years of exclusivity provided to MUMS drugs; but, the most useful interpretation of the value of this extended marketing exclusivity is that it provides a sponsor an opportunity to lower its perception of an acceptable ''going'' market value to support drug development because the sponsor has longer to recoup development costs without competition. In the previous example, this would mean that the $60M fair and reasonable market value prior to competition established under GADPTRA could be spread over 7 years instead of 5 with the result that the ''going'' market value (third year market value) for a drug with development costs of $15M would only need to be $10M in order to support drug development (i.e., $3.5M + 6.5M + 10M + 10M + 10M + 10M + 10M). Therefore, assuming for the purposes of a general estimate that the ramp-up to a going market is roughly linear as shown in the example, in a practical sense, the economic value of the 7 years of exclusive marketing rights for MUMS drugs is to lower the ''going'' market value needed to support drug development by about one-third. It should be noted that MUMS exclusive marketing rights provide protection from competition from all products with the same drug, same dosage form, and same intended use rather than just from generics under GADPTRA and this provides additional value to this incentive.

Having estimated the market value of this MUMS incentive as a one third reduction in the ''going'' market value, in order to define ''small number,'' the agency's task is then to estimate the number of animals of each major companion animal species the drug treatment of which represents a drug market value, that is about two-thirds of the estimated cost of drug development for each of these species.

The agency is well aware of the enormous variability that will be encompassed by one estimate of drug development cost for each major companion animal species. For companion animals, an estimated range of drug development costs for first-time approval of an animal drug is $10 to $20 million, with additional estimates as low as $5 million (Ref. 6). Based on these estimates, the agency believes $15 million represents the average drug development cost.

2. Additional Factors Unique to Companion Animals

The number of major species companion animals eligible for treatment on an annual basis that represents a drug market value roughly equivalent to two-thirds of the estimated drug development cost for these major species depends on a large number of factors affecting the drug treatment value of individual animals. For purposes of this discussion, drug treatment value means the portion of the cost of treating an animal with a given drug that is returned to the sponsor of the drug. Again, the agency acknowledges the great variability that will be encompassed in one estimate of drug treatment value for individual animals of each major companion animal species. The drug treatment value of individual animals is a portion of the cost that animal owners are willing to pay to have animals treated for a given condition. The sum of the drug treatment values of all of the animals treated with a given drug over the course of a year represents the sponsor's annual market value of that drug.

Two of the most basic factors affecting drug market value are the species involved, which significantly affects the amount that people are willing to pay to treat an individual animal, and the percentage of the eligible population of animals that is actually treated under typical circumstances.

Drug treatment values must be considered in the context of the cost of ancillary veterinary services associated with diagnosis and subsequent treatment. Clearly, costs ancillary to drug costs may decrease the likelihood of a decision to treat a given animal. For a given drug, the drug treatment value, the ancillary cost of treatment, the practitioner's decision to markup the drug cost to the client, and the decision of the client to accept the total cost of treating an animal are all inter-related. As the drug treatment value increases, other costs may decrease in order for the total cost of treatment to be made acceptable to a given client. Available information regarding the amount that people are willing to pay to treat representative conditions in the three

major companion animal species is quite variable (Ref. 6). However, based on available information, the agency concludes that companion animal owners generally will pay more to treat a horse than a dog, and more to treat a dog than a cat (Ref. 6). Based on available information, the agency further concludes that a reasonable annual drug treatment value for conditions significantly affecting the health of individual animals of these species is about $500 for horses, about $350 for dogs, and about $200 for cats (Ref. 6).

For any given condition, many animals that are eligible to be treated will not actually be treated and the decision to treat will depend to a large extent on the nature of the condition and the cost of treatment. While an estimate of the likelihood of treatment must be very general to represent the large variability encompassed by that estimate, based on the factors described previously and currently available information (Ref. 7), the agency believes that it is reasonable to estimate a 50 percent non-treatment rate across all major companion animal species.

Defining small numbers for companion animal species must take into account the uncertainty inherent in the estimates of prevalence or incidence of diseases or conditions that occur in relatively small numbers of animals. Therefore, a disease prevalence or incidence estimate submitted with a request for minor use designation will be considered relative to its degree of uncertainty to enable the agency to be 90 percent confident that the actual prevalence or incidence of the disease at issue is at or below the estimate, and that the resulting estimate is below the small number threshold.

Even reasonably good estimates, such as those based on published articles involving actual tabulation of a number of cases of the disease or condition at issue gathered at multiple sites or over an extended time, or results of surveys involving about a hundred respondents, appear to present uncertainties on the order of +/- 10 percent around the estimate. Since at least +/- 10 percent uncertainty is likely to exist for most estimates, based on an assumption of normal distribution, the agency has also increased the proposed small numbers for companion animals by approximately 13 percent to account for this. The practical effect of this approach is that an estimated prevalence or incidence that is on the order of 12 percent below the proposed threshold could be accepted as a small number with 90 percent confidence that it is truly below the threshold when the uncertainty associated with the estimate is on the order of +/- 10 percent or less, but could be rejected as a small number if the uncertainty associated with the estimate is sufficiently above 10 percent.

Finally, proposed thresholds were somewhat increased to achieve ''round'' numbers. Given the variability associated with several of its assumptions, the agency believes that this is acceptable.

In summary, the following assumptions underlie the proposed ''small numbers'' definition for companion animals:

(1) A reasonably representative development cost for a new companion animal drug is about $15 million.

(2) Without incentives, a sponsor will generally need to perceive a market potential in the third year of marketing equal to the development cost of the product in order to pursue development.

(3) Due to the extended exclusive marketing rights, the ''going market'' for a MUMS product can be about one-third less than the market normally required for a sponsor to pursue drug development.

(4) Although the amount individual animal owners spend on companion animals is highly variable, companion animal owners generally will pay more for the treatment of a horse than for a dog and more for a dog than a cat.

(5) Treatment costs ancillary to drug treatment value decrease the likelihood of a decision to treat a given animal and provide no return on investment to sponsors.

(6) The drug treatment value for a horse is about $500, for a dog about $350, and for a cat about $200.

(7) There is about a 50 percent non-treatment rate across all major companion animal species.

(8) There is about 10 percent uncertainty in even the best published estimates of disease incidence or prevalence in companion animals.

A ''small number of animals'' for each of the three major companion animal species can be calculated by incorporating these assumptions into the following formula:
[average companion animal drug development cost in dollars] - 1/3 = [minor use ''going market'' in dollars] ÷ [average drug treatment value in dollars for each species] = [a preliminary small number of animals] x 2 (untreated factor) + 13% (uncertainty factor) + (increase to ''round'' number) = [species specific ''small number of animals'']

The agency recognizes that there is considerable variability within each of these assumptions. However, in order to consistently and fairly implement the designation provision of the MUMS act, FDA believes it is vital to establish one ''small number'' for each major species. The agency's task is to set these numbers so that they can be applied to a wide variety of requests for minor use designation. This is the same task that Congress undertook when it established by statute a threshold number of 200,000 for human orphan drugs (section 526(a)(2) of the act) (21 U.S.C. 360bb(a)(2)).

Following this approach, the agency proposes defining ''small numbers'' for the major companion animal species as: 50,000 horses, 70,000 dogs, and 120,000 cats affected annually.

B. ''Small Numbers'' for Major Species of Food-Producing Animals

For the reasons discussed in Background section I.B. of this document, FDA is proposing to establish ''small numbers'' in a different manner for food-producing animals than for companion animals.

Just as it did with respect to establishing ''small numbers'' for companion animals, the agency looked for a benchmark to serve as a basis for quantifying a threshold small number for each food-producing major species. Consistent with comments received on the MUMS designation proposed rule (Refs. 1 and 3), the benchmark that the agency found to be most appropriate for food-producing animals is based on a comparison between major and minor food-producing species, and the minor food-producing species most directly comparable to major food-producing species with respect to drug development costs, animal husbandry, and the nature and scope of drug use is sheep.

The market for new animal drug sales represented by that portion of the U.S. sheep population that could reasonably be treated on an annual basis qualifies for the incentives of MUMS designation because sheep are a minor species. The market for sheep drugs thus represents a market for food-producing animal species that Congress determined merited MUMS act incentives in order to stimulate drug development. Therefore, it is reasonable that an intended use in a major food-producing species that represents a similar size market should also qualify for these incentives.

To serve as a reasonable estimate of the size of the drug market for sheep, and to permit an equitable comparison across all major food-producing species, the agency used the biomass of sheep presented to slaughter facilities in the United States in 2004 (the year of

passage of the MUMS act) as the basis for extrapolation to establish small numbers for major food-producing species. Because new animal drugs are usually dosed by weight, biomass serves as a reasonable basis for extrapolation because the amount of drug sold to treat a particular food-producing species over the course of a year roughly correlates to the total weight, or biomass, of the animal species being treated during that year.

The biomass of sheep going to slaughter in 2004 represents slightly less than 50 percent of the total biomass of sheep existing in that year and, therefore, represents an assumption that 50 percent of sheep existing in 2004 might have been treated with a given drug during that year. Given the limited amount of information available regarding disease prevalence or incidence in food-producing animals, treatment of 50 percent of the sheep population by a given drug is considered by the agency to be a reasonable estimate of the maximum drug market for the species. As previously noted, this estimate also represents a food-producing species drug market that Congress established as eligible for MUMS act incentives.

The amount of biomass from sheep (including lambs) arriving at slaughter facilities in 2004 (the total live weight of animals presented for slaughter) is reported by the U.S. Department of Agriculture (USDA) (Ref. 8) to be 380,000,000 (380M) pounds (lbs). Therefore, we propose to define the ''small number'' that represents ''minor use'' for each major food-producing animal species as the number of animals going to slaughter in 2004 that produced a cumulative biomass equivalent to 380M lbs/year.

Following this approach, based on USDA statistics for 2004 for cattle, pigs, turkeys and chickens (Refs. 4 and 8), 380M pounds of biomass (live weight at slaughter) roughly equates to 310,000 cattle (at 1,240 lbs/animal); 1,450,000 pigs (at 266 lbs/animal); 14,000,000 turkeys (at 27 lbs/bird); and 72,000,000 chickens (at 5.3 lbs/bird).

C. Small Numbers as a Limitation to ''Wider Use''

As noted previously, the legislative history of the MUMS act states that the statutory definition for minor use ''incorporates the existing definition in the Code of Federal Regulations (21 CFR 514.1(d)(1)) with a further limitation to small numbers to assure that such intended uses will not be extended to a wider use'' (S. Rept. 108–226 at 12 13). The agency believes that the ''small number of animals'' of each major species being proposed to clarify the definition of ''minor use'' meets the dual goals that Congress established in the legislative history of the MUMS act to provide added incentives for animal drug development while assuring that the proposed ''small numbers'' will not result in minor uses being ''extended to a wider use'' in major animal species.

D. Proposed ''Small Numbers''

Based on an assessment of all of the factors noted previously, and for the purpose of further defining ''minor use'' under the Minor Use and Minor Species Animal Health Act of 2004 and 21 CFR 516.3, the agency proposes to define ''small numbers'' for each major species as equal to or less than each of the following numbers:

TABLE 1.—PROPOSED SMALL NUMBERS FOR EACH MAJOR SPECIES

Species	Small Number
Horses	50,000
Dogs	70,000
Cats	120,000
Cattle	310,000
Pigs	1,450,000
Turkeys	14,000,000
Chickens	72,000,000

Finally, as noted in the response to comments on the proposed MUMS designation rule (see 72 FR 41010 at 41012), paragraph (c) of § 516.21 (21 CFR 516.21) (Documentation of minor use status) is unnecessary once small numbers of animals have been established. Because the agency is proposing to establish small numbers of animals at this time, the agency is also proposing to remove § 516.21(c) and its associated burden on the animal pharmaceutical industry.

III. Legal Authority

FDA's authority for issuing this proposed rule is provided by the Minor Use and Minor Species Animal Health Act of 2004 (section 571 of the act) (21 U.S.C. 360ccc *et seq.*). When Congress passed the MUMS act, it directed FDA to publish implementing regulations (see 21 U.S.C. 360ccc note). In the context of the MUMS act, the statutory requirements of section 573 of the act, along with section 701(a) of the act (21 U.S.C. 371(a)) provide authority for this proposed rule. Section 701(a) authorizes the agency to issue regulations for the efficient enforcement of the act.

IV. Analysis of Economic Impacts

FDA has examined the impacts of the proposed rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; and distributive impacts and equity). The agency believes that this proposed rule is not a significant regulatory action as defined by the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the proposed rule is only expected to slightly reduce the administrative effort of ''minor use'' requestors while imposing no additional costs, the agency does not believe that this proposed rule would have a significant economic impact on a substantial number of small entities. FDA requests comment on this issue.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $127 million, using the most current (2006) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this proposed rule to result in any 1-year expenditure that would meet or exceeded this amount.

FDA previously published both a proposed rule and final rule on the MUMS designation system. Each of these publications included analyses of the expected economic impacts of the creation and administration of the MUMS designation system as required by the Executive order and two statutes mentioned in the previous paragraphs. The final rule presented estimates of the annual costs of the MUMS designation system of about $65,000 annually. Additionally, the final rule provided some discussion of, but was not able to quantify, the expected benefits of the rule.

The final rule included a statement that it would address the issue of

establishing a definition of ''small number'' of animals in a future rulemaking. This proposed rule proposes that definition of ''small number'' of animals for each of the seven major animal species as defined by the MUMS act, based on the data and analysis as described previously in this preamble.

This proposed rule would set an upper limit on the number of animals of each of the seven major animal species for which a request for designation could be made under the ''minor use'' provisions of the MUMS designation final rule. FDA does not have any additional information to show that these proposed threshold numbers would significantly affect the expected number of MUMS designation requests that are received by the agency each year (estimated at 75 requests per year in the MUMS designation final rule). The proposed definition of a ''small number'' of each of the seven major species reduces the ambiguity for ''minor use'' requestors. Additionally, this proposed rule would provide for a small reduction in administrative effort by ''minor use'' requestors who would no longer be required to provide additional information on potential markets and drug development costs due to the proposed deletion of § 516.21(c). As such, FDA has determined that the proposed rule would not impose any additional costs or provide any further health benefits beyond those contained in the MUMS designation final rule.

V. Paperwork Reduction Act of 1995

This proposed rule does not contain new information collection provisions that would be subject to review by OMB, under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520).

Title: Setting ''Small Numbers of Animals'' for Determining Minor Use

Description: This proposed rule is intended to revise the minor use provisions of 21 CFR part 516, subpart B. Part 516 contains the implementing regulations for the Minor Use and Minor Species Animal Health Act of 2004, and subpart B contains the designation provisions for minor use and minor species new animal drugs. Currently, requests for minor use designation are considered case-by-case by the agency based on product-specific financial information supporting minor use status included in the request. In order to further define minor use, this rule proposes seven threshold ''small numbers of animals,'' one for each major species, based on industry-wide economic or animal production data. With these numbers in place, drug sponsors requesting minor use designation will no longer be required to submit confidential product-specific financial information, as currently required in § 516.21(c), thus lowering their reporting burden somewhat. However, we anticipate that most requests for designation will be for minor species, not minor use, and furthermore, the current requirement for financial information is only one part of a request for designation, therefore, the paperwork burden currently assigned to 21 CFR 516.20 will not be affected significantly.

Information collection requirements in this section were approved by OMB and assigned OMB control number 0910–0605.

VI. Environmental Impact

We have carefully determined under 21 CFR 25.30(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VII. Federalism

FDA has analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the proposed rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the agency has tentatively concluded that the proposed rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

VIII. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA through FDMS only.

IX. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**), and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Public comment to Docket No. 2005N–0329, comment EC3, received February 2, 2006, submitted by American Veterinary Medical Association (AVMA), signed by Elizabeth Curry-Galvin.

2. Public comment to Docket No. 2005N–0329, comment C5, received January 26, 2006, submitted by Animal Health Institute, signed by Richard Carnevale.

3. Public comment to Docket No. 2005N–0329, comment EMC3, received December 12, 2005, submitted by Keep Antibiotics Working, signed by Rebecca Goldburg and Steve Roach.

4. USDA/National Agricultural Statistics Service, ''Poultry Slaughter 2004 Annual Summary,'' February 2005.

5. USDA/Animal and Plant Health Inspection Service, ''2004 United States Animal Health Report,'' August 2005.

6. Brakke Consulting, Inc., ''Disease Incidence Rates, Drug Development and Treatment Costs,'' September 2005.

7. AVMA, ''U.S. Pet Ownership & Demographics Sourcebook,'' 2002.

8. USDA/National Agricultural Statistics Service, ''2004 Livestock Slaughter Report,'' March 2005.

List of Subjects in 21 CFR Part 516

Administrative practice and procedure, Animal drugs, Confidential business information, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 516 be amended as follows:

PART 516—NEW ANIMAL DRUGS FOR MINOR USE AND MINOR SPECIES

1. The authority citation for 21 CFR part 516 continues to read as follows:

Authority: 21 U.S.C. 360ccc–1, 360ccc–2, 371.

2. Amend § 516.3 by adding a new definition in alphabetical order to paragraph (b) as follows:

§ 516.3 Definitions.

* * * * *

(b) * * *

Small number of animals means equal to or less than 50,000 horses, 70,000 dogs, 120,000 cats, 310,000 cattle,

1,450,000 pigs, 14,000,000 turkeys, and 72,000,000 chickens.

* * * * *

§ 516.21 [Amended]

3. Amend § 516.21 by removing paragraph (c).

Dated: January 29, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy.

[FR Doc. E8–5385 Filed 3–17–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–149856–03]

RIN 1545–BD01

Dependent Child of Divorced or Separated Parents or Parents Who Live Apart; Hearing

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of public hearing on proposed rulemaking.

SUMMARY: This document contains a notice of public hearing on proposed regulations relating to a claim that a child is a dependent by parents who are divorced, legally separated under a decree of separate maintenance, agreement, or who live apart at all times during the last 6 months of the calendar year.

DATES: The public hearing is being held on April 3, 2008, at 10 a.m. The IRS must receive outlines of the topics to be discussed at the hearing by March 26, 2008.

ADDRESSES: The public hearing is being held in Room 2615, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

Send submissions to: CC:PA:LPD:PR (REG–149856–03), Room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–149856–03), Couriers Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC or sent electronically, via the IRS internet site via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS–REG–149856–03).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Victoria Driscoll (202) 622–4920; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Regina Johnson (202) 622–7180 (not toll free numbers).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is the notice of proposed regulations (REG–149856–03) that was published in the **Federal Register** on Wednesday, May 2, 2007 (72 FR 24192).

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing that submitted written comments by July 31, 2007, must submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (signed original and eight (8) copies).

A period of 10 minutes is allotted to each person for presenting oral comments.

After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing.

Because of access restrictions, the IRS will not admit visitors beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this document.

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Associate Chief Counsel, Legal Processing Division (Procedures and Administration).

[FR Doc. E8–5451 Filed 3–17–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–127391–07]

RIN 1545–BH02

Guidance Under Section 664 Regarding the Effect of Unrelated Business Taxable Income on Charitable Remainder Trusts; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to a notice of proposed rulemaking.

SUMMARY: This document contains corrections to a notice of proposed rulemaking (REG–127391–07) that was published in the **Federal Register** on Friday, March 7, 2008 (73 FR 12313) providing guidance under Internal Revenue Code section 664 on the tax effect of unrelated business taxable income (UBTI) on charitable remainder trusts.

FOR FURTHER INFORMATION CONTACT: Cynthia Morton at (202) 622–3060 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The correction notice that is the subject of this document is under section 664 of the Internal Revenue Code.

Need for Correction

As published, a notice of proposed rulemaking (REG–127391–07) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of a notice of proposed rulemaking (REG–127391–07), which was the subject of FR Doc. E8–4576, is corrected as follows:

1. On page 12314, column 3, in the preamble, under the paragraph heading ''Comments and Public Hearing'', line 2 of the second paragraph, the language ''for April 11, 2007, at 10 a.m., in the IRS'' is corrected to read ''for April 11, 2008, at 10 a.m., in the IRS''.

2. On page 12314, column 3, in the preamble, under the paragraph heading ''Comments and Public Hearing'', line 8 of the third paragraph, the language ''and eight (8) copies) by March 28, 2007.'' is corrected to read ''and eight (8) copies) by March 28, 2008.''.

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. E8–5336 Filed 3–17–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–151135–07]

RIN 1545–BH39

Multiemployer Plan Funding Guidance

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under section 432

of the Internal Revenue Code (Code). These proposed regulations provide additional rules for certain multiemployer defined benefit plans that are in effect on July 16, 2006. These proposed regulations affect sponsors and administrators of, and participants in multiemployer plans that are in either endangered or critical status. These regulations are necessary to implement the new rules set forth in section 432 that are effective for plan years beginning after 2007. The proposed regulations reflect changes made by the Pension Protection Act of 2006.

DATES: Written or electronic comments and requests for public hearing must be received by June 16, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–151135–07), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–151135–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–151135–07).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Bruce Perlin, (202) 622–6090; concerning submissions and requests for a public hearing, *Richard.A.Hurst@irscounsel.treas.gov* or at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d). Comments on the collection of information should be sent to the Office of Management and Budget, *Attn:* Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, *Attn:* IRS Reports Clearance Officer, SE:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by May 19, 2008. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in this regulation is in § 1.432(b)–1(d) and (e). This information is required in order for a qualified multiemployer defined benefit plan's enrolled actuary to provide a timely certification of the plan's funding status. In addition, if it is certified that a plan is or will be in critical or endangered status, the plan sponsor is required to notify the Department of Labor, the Pension Benefit Guaranty Corporation, the bargaining parties, participants, and beneficiaries of the status designation. For plans in critical status, the plan sponsor is required to include in the notice an explanation of the possibility that adjustable benefits may be reduced at a later date and that certain benefits are restricted as of the date the notice is sent. The annual certification by the enrolled actuary for the plan will be used to provide an accurate determination and certification of the plan's funded status and to provide notice to the required parties of the status designation. The collection of information is mandatory. The likely respondents are multiemployer plan sponsors and enrolled actuaries.

Estimated total annual reporting burden: 1,200 hours.

Estimated average annual burden hours per respondent: 0.75 hours.

Estimated number of respondents: 1,600.

Estimated annual frequency of responses: Occasional.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains proposed Income Tax Regulations (26 CFR part 1) under section 432, as added to the Internal Revenue Code by the Pension Protection Act of 2006 (PPA 06), Public Law 109–280, 120 Stat 780.

Section 412 contains minimum funding rules that generally apply to pension plans. Section 431 sets forth the funding rules that apply specifically to multiemployer defined benefit plans. Section 432 sets forth additional rules that apply to multiemployer plans in effect on July 16, 2006, that are in endangered or critical status.[1]

Section 432 generally provides for a determination by the enrolled actuary for a multiemployer plan as to whether the plan is in endangered status or in critical status for a plan year. In the first year that the actuary certifies that the plan is in endangered status, section 432(a)(1) requires that the plan sponsor adopt a funding improvement plan. The funding improvement plan must meet the requirements of section 432(c) and the plan must apply the rules of section 432(d) during the period that begins when the plan is certified to be in endangered status and ends when the plan is no longer in that status. In the first year that the actuary certifies that the plan is in critical status, section 432 (a)(2) requires that the plan sponsor adopt a rehabilitation plan. The rehabilitation plan must meet the requirements of section 432(e) and the plan must apply the rules of section 432(f) during the period that begins when the plan is certified to be in critical status and ends when the plan is no longer in that status. In addition, section 432(f)(2) requires that the plan suspend certain actions as described more fully in this preamble.

Section 432(b)(3)(A) requires an actuarial certification of whether or not a multiemployer plan is in endangered status, and whether or not a multiemployer plan is or will be in critical status, for each plan year. This certification must be completed by the

[1] Section 302 and section 304 of the Employee Retirement Income Security Act of 1974, as amended (ERISA) sets forth funding rules that are parallel to those in section 412 and section 431 of the Code. Section 305 of ERISA sets forth additional rules for multiemployer plans that are parallel to those in section 432 of the Code. Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713) and section 302 of ERISA, the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these proposed regulations for purposes of ERISA, as well as the Code. Thus, these Treasury Department regulations issued under section 432 of the Code apply as well for purposes of ERISA section 305.

90th day of the plan year and must be provided to the Secretary of the Treasury and to the plan sponsor. If the certification is with respect to a plan year that is within the plan's funding improvement period or rehabilitation period arising from a prior certification of endangered or critical status, the actuary must also certify whether or not the plan is making scheduled progress in meeting the requirements of its funding improvement or rehabilitation plan. Failure of the plan's actuary to certify the status of the plan is treated as a failure to file the annual report under section 502(c)(2) of the Employee Retirement Income Security Act of 1974 (ERISA). Thus, a penalty of up to $1,100 per day applies.

Under section 432(b)(1), a multiemployer plan is in endangered status if the plan is not in critical status and, as of the beginning of the plan year, (1) the plan's funded percentage for the plan year is less than 80 percent, or (2) the plan has an accumulated funding deficiency for the plan year or is projected to have an accumulated funding deficiency in any of the six succeeding plan years (taking into account amortization extensions under section 431(d)). Under section 432(i), a plan's funded percentage is the percentage determined by dividing the value of the plan's assets by the accrued liability of the plan.

Under section 432(b)(2), a multiemployer plan is in critical status for a plan year if it meets any of four specified tests. Under section 432(b)(2)(A), a plan is in critical status if, as of the beginning of the plan year: (1) The funded percentage of the plan is less than 65 percent and (2) the sum of (A) the market value of plan assets, plus (B) the present value of reasonably anticipated employer contributions for the current plan year and each of the six succeeding plan years is less than the present value of all nonforfeitable benefits projected to be payable under the plan during the current plan year and each of the six succeeding plan years (plus administrative expenses). For this purpose, employer contributions are determined assuming that the terms of all collective bargaining agreements pursuant to which the plan is maintained for the current plan year continue in effect for succeeding plan years.

Under section 432(b)(2)(B), a plan is in critical status if the plan has an accumulated funding deficiency for the current plan year or is projected to have an accumulated funding deficiency for any of the three succeeding plan years. For purposes of this test, the determination of accumulated funding deficiency is made not taking into account any amortization extension under section 431(d). In addition, if a plan has a funded percentage of 65 percent or less, the three-year period for projecting whether the plan will have an accumulated funding deficiency is extended to four years.

Under section 432(b)(2)(C), a plan is in critical status for the plan year if (1) the plan's normal cost for the current plan year, plus interest for the current plan year on the amount of unfunded benefit liabilities under the plan as of the last day of the preceding year, exceeds the present value of the reasonably anticipated employer and employee contributions for the current plan year, (2) the present value of nonforfeitable benefits of inactive participants is greater than the present value of nonforfeitable benefits of active participants, and (3) the plan has an accumulated funding deficiency for the current plan year, or is projected to have an accumulated funding deficiency for any of the four succeeding plan years (not taking into account amortization period extensions under section 431(d)).

Under section 432(b)(2)(D), a plan is in critical status for a plan year if the sum of (A) the market value of plan assets, and (B) the present value of the reasonably anticipated employer contributions for the current plan year and each of the four succeeding plan years is less than the present value of all benefits projected to be payable under the plan during the current plan year and each of the four succeeding plan years (plus administrative expenses). For this purpose, employer contributions are determined assuming that the terms of all collective bargaining agreements pursuant to which the plan is maintained for the current plan year continue in effect for succeeding plan years.

In making the determinations and projections applicable under the endangered and critical status rules, the plan actuary must make projections for the current and succeeding plan years of the current value of the assets of the plan and the present value of all liabilities to participants and beneficiaries under the plan for the current plan year as of the beginning of such year. The actuary's projections must be based on reasonable actuarial estimates, assumptions, and methods that offer the actuary's best estimate of anticipated experience under the plan. An exception to this rule applies in the case of projected industry activity. Any projection of activity in the industry or industries covered by the plan, including future covered employment and contribution levels, must be based on information provided by the plan sponsor, and the plan sponsor must act reasonably and in good faith. The projected present value of liabilities as of the beginning of the year must be based on either the most recent actuarial statement required with respect to the most recently filed annual report or the actuarial valuation for the preceding plan year.

Under section 432(b)(3)(B)(ii), any actuarial projection of plan assets must assume (1) reasonably anticipated employer contributions for the current and succeeding plan years, assuming that the terms of one or more collective bargaining agreements pursuant to which the plan is maintained for the current plan year continue in effect for the succeeding plan years, or (2) that employer contributions for the most recent plan year will continue indefinitely, but only if the plan actuary determines that there have been no significant demographic changes that would make continued application of such terms unreasonable.

The first year that an actuary certifies that a plan is in endangered or critical status establishes a timetable for a number of actions. Under section 432(b)(3)(D), within 30 days after the date of certification, the plan sponsor must notify the participants and beneficiaries, the bargaining parties, the PBGC and the Secretary of Labor of the plan's endangered or critical status. If it is certified that a plan is or will be in critical status, the plan sponsor must include in the notice an explanation of the possibility that (1) adjustable benefits (as defined in section 432(e)(8)) may be reduced and (2) such reductions may apply to participants and beneficiaries whose benefit commencement date is on or after the date such notice is provided for the first plan year in which the plan is in critical status.

If a plan is certified to be in critical status, the plan must take certain actions after notifying the plan participants of the critical status. Specifically, section 432(f)(2) restricts the payment of benefits that are in excess of a single life annuity (plus any social security supplement) effective on the date the notice is sent. Section 432(f)(2)(B) provides that this restriction does not apply to amounts that may be immediately distributed without the consent of the employee under section 411(a)(11) and to any makeup payment in the case of a retroactive annuity starting date or a similar payment of benefits owed with respect to a prior period. In addition, the plan sponsor must refrain from making any payment for the purchase of an irrevocable

commitment from an insurer to pay benefits.

Sections 432(c)(1) and 432(e)(1) provide that in the first year that a plan is certified to be in endangered or critical status, the plan sponsor must adopt a funding improvement plan (in the case of a plan that is in endangered status) or a rehabilitation plan (in the case of a plan that is in critical status). The deadline for adoption of the funding improvement plan or rehabilitation plan is 240 days after the deadline for the certification. Accordingly, if the actuarial certification is made after the 90-day deadline, the amount of time for adopting the funding improvement plan or rehabilitation plan is shortened.

Section 432(c)(3) defines a funding improvement plan as a plan which consists of the actions, including options or a range of options, to be proposed to the bargaining parties, formulated to provide, based on reasonably anticipated experience and reasonable actuarial assumptions, for the attainment by the plan of certain requirements. Those requirements are based on a statutorily specified improvement in the plan's funding percentage from the percentage that applied on the first day of the funding improvement period. The first day of the funding improvement period is defined in section 432(c)(4) as the first day of the first plan year beginning after the earlier of (1) the second anniversary of the date of the adoption of the funding improvement plan or (2) the expiration of the collective bargaining agreements in effect on the due date for the actuarial certification of endangered status for the initial endangered year and covering, as of such due date, at least 75 percent of the active participants in such multiemployer plan.

Section 432(d)(1) sets forth rules that apply after the certification of endangered status and before the first day of the funding improvement period. After the adoption of the funding improvement plan, section 432(d)(2) prohibits any amendments that are inconsistent with the funding improvement plan. In addition, section 432(d)(2) provides special rules for acceptance of collective bargaining agreements and plan amendments that increase benefits.

A rehabilitation plan is a plan which consists of the actions, including options or a range of options, to be proposed to the bargaining parties, formulated to provide, based on reasonably anticipated experience and reasonable actuarial assumptions, for the attainment by the plan of certain requirements. Generally, the rehabilitation plan should enable the plan to emerge from critical status by the end of a 10-year period that begins after the earlier of (1) the second anniversary of the date of the adoption of the rehabilitation plan or (2) the expiration of the collective bargaining agreements in effect on the due date for the actuarial certification of critical status for the initial critical year and covering, as of such due date, at least 75 percent of the active participants in such multiemployer plan. For this purpose a plan emerges from critical status when the plan actuary certifies that the plan is not projected to have an accumulated funding deficiency for the plan year or any of the nine succeeding plan years, without regard to the use of the shortfall method and taking into account amortization period extensions under section 431(d). As an alternative, if the plan sponsor determines that, based on reasonable actuarial assumptions and upon exhaustion of all reasonable measures, the plan cannot reasonably be expected to emerge from critical status by the end of the 10-year period, the requirements for a rehabilitation plan are that the plan include reasonable measures to emerge from critical status at a later time or to forestall possible insolvency (within the meaning of section 4245 of ERISA).

Section 432(e)(8) allows a rehabilitation plan for a plan that is in critical status to provide for a reduction of certain ''adjustable'' benefits that would otherwise be protected by section 411(d)(6). These adjustable benefits include early retirement benefits and retirement-type subsidies within the meaning of section 411(d)(6)(B)(i). Under section 432(e)(8)(A)(ii), no reduction will apply to a participant whose benefit commencement date is before the date the notice under section 432(b)(3)(D) for the initial critical year is provided. Under section 432(e)(8)(B), except with respect to certain benefit increases described in 432(e)(8)(A)(iv)(III), a plan is not permitted to reduce the level of a participant's accrued benefit payable at normal retirement age. Furthermore, section 432(e)(8)(C) prohibits any reduction until 30 days after plan participants and beneficiaries, employers and employee organizations are notified of the reduction.

In years after the initial critical year or initial endangered year, sections 432(c)(6) and 432(e)(3)(B) provide that the plan sponsor must annually update the funding improvement or rehabilitation plan. This includes updating the schedule of contribution rates. Updates are required to be filed with the plan's annual report.

Section 432(f)(4) sets forth rules that apply after the certification of critical status and before the first day of the rehabilitation period. After the adoption of the rehabilitation plan, section 432(f)(1) prohibits any amendments that are inconsistent with the rehabilitation plan.

Section 432(h) provides rules for the treatment of employees who participate in the plan even though they are not covered by a collective bargaining agreement.

Section 432(i) provides a number of definitions that apply for purposes of section 432. For example, under section 432(i)(8), the actuary's determination with respect to a plan's normal cost, actuarial accrued liability, and improvements in a plan's funded percentage must be based on the unit credit funding method (whether or not that method is used for the plan's actuarial valuation).

Section 432 is effective for plan years beginning on or after January 1, 2008. Section 212(e)(2) of PPA '06 provides a special rule permitting a plan to provide the notice described in section 432(b)(3)(D) on an early basis. Specifically, if the plan actuary certifies that the plan is reasonably expected to be in critical status for the first plan year beginning after 2007, the plan is permitted to provide the notice described in section 432(b)(3)(D) at any time between the enactment of PPA '06 and the date the notice is otherwise required to be provided.

Explanation of Provisions

Overview

These regulations provide guidance with respect to certain of the provisions of section 432. Specifically, these regulations provide guidance regarding the determination of when a plan is in endangered status or critical status and the associated notices. These regulations do not provide guidance with respect to all issues relating to a multiemployer plan that is in endangered or critical status. For example, no guidance is provided on the parameters for the adoption of a funding improvement plan or rehabilitation plan. Guidance with respect to additional issues will be included in a second set of regulations that are expected to be issued this year.

§ 1.432(a)–1 General Rules Relating to Section 432

Section 1.432–1 provides general rules relating to section 432, including definitions of certain terms used for purposes of section 432 and the special

rules that apply to participants in multiemployer plans who are not participating pursuant to a collective bargaining agreement.

The regulations provide that effective on the date that a notice of critical status for the initial critical year is sent to the plan participants, the plan must not pay any benefit in excess of the monthly amount paid under a single life annuity (plus any social security supplement) and is not permitted to purchase an irrevocable commitment from an insurer to pay benefits. The restriction does not apply to the small-dollar cash-outs allowed under section 411(a)(11) nor to the make-up payments under a retroactive annuity starting date.

The regulations provide that if the notice described in section 432(b)(3)(D) has been sent and the restrictions provided under section 432(f)(2) have been applied, and it is later determined that the restrictions should not have been applied, then the plan must correct any benefit payments that were restricted in error. The regulations provide two examples of situations requiring this correction, each of which involves an actuary certifying that the plan is reasonably expected to be in critical status for the first plan year beginning after 2007, followed by an early notification of critical status that is made to employees under the rules of section 212(e)(2) of PPA '06. In one example of a plan taking actions that require correction, the plan restricts benefits before the first plan year beginning after 2007 (the effective date of section 432). In the second such example, the plan is not in critical status for the first plan year beginning after 2007 (even though the enrolled actuary for the plan had certified that it is reasonably expected that the plan will be in critical status with respect to that year).

The regulations incorporate a number of definitions listed in section 432(i) along with other definitions that are located in sections 432(c) and (e). The regulations do not include the broad provision under section 432(i)(8) to use the unit credit funding method for purposes of the plan's ''normal cost, actuarial accrued liability, and improvements in a plan's funded percentage.'' Instead, consistent with the intended scope of section 432(i)(8), the regulations require the use of this funding method solely for purposes of determining a plan's funded percentage and the section 432(b)(2)(C)(i) comparison of contributions with the sum of the plan's normal cost and interest on the amount of unfunded liability. Thus, the determination of whether a plan is projected to have an accumulated funding deficiency in the determination of a plan's status under section 432 is based on the plan's actual funding method, rather than the unit credit funding method. The regulations substitute the term ''initial endangered year'' for the statutory term ''initial determination year.''

In addition, the regulations provide guidance for plans that change their status in subsequent years. For example, a plan that is in critical status may emerge from that status and later reenter critical status. In such a circumstance, the year of reentry into critical status is treated as the initial critical year. Similarly, a plan that is in endangered status may have a status change and at a later date reenter endangered status. In such a circumstance, the year of reentry into endangered status is treated as the initial endangered year.

§ 1.432(b)–1 Determination of Status and Adoption of a Plan

The regulations provide rules for the determination of whether a plan is in endangered status or critical status within the meaning of section 432(b)(1) and (2). These rules reflect the different ways a plan can be in endangered status under section 432(b)(1)(A) or (B) and in critical status under section 432(b)(2)(A), (B), (C), or (D). The regulations also provide that a plan is in critical status for a plan year if it was in critical status in the immediately preceding year and the plan does not meet the emergence from critical status rule of section 432(e)(4)(B). Thus, a plan that was in critical status for the prior year will remain in critical status if the enrolled actuary for the plan certifies that the plan is projected to have an accumulated funding deficiency for the plan year or any of the 9 succeeding plan years, without regard to the use of the shortfall funding method but taking into account any extensions of the amortization periods under section 431(d).

The regulations provide limited guidance on the actuarial projections that are used for purposes of the certification of status by the enrolled actuary for the plan. The projections must generally be based on reasonable actuarial assumptions and methods that, as under section 431(c)(3), offer the actuary's best estimate of anticipated experience under the plan. The actuarial projection of future contributions and assets must assume either that the terms of the one or more collective bargaining agreements pursuant to which the plan is maintained for the current plan year continue in effect for succeeding plan years, or that the dollar amount of employer contributions for the most recent plan year will continue indefinitely. If the actuarial projections assume the continued maintenance of the collective bargaining agreements, the plan sponsor must provide a projection of activity in the industry, including future covered employment, to the plan actuary, and the actuary is permitted to rely on those projections. In making these projections, the plan sponsor must act reasonably and in good faith. The alternative assumption that the dollar amount of contributions remains unchanged into the future is only available if the enrolled actuary for the plan determines there have been no significant demographic changes that would make such assumption unreasonable. In addition, the regulations provide that the alternative assumption is not available for purposes of determining whether the plan is in critical status under the tests in section 432(b)(2)(A) and (D).

The projected present value of liabilities as of the beginning of such year is determined based on the most recent information reported on the most recent of either the actuarial statement required under section 103(d) of ERISA that has been filed with respect to the most recent year, or the actuarial valuation for the preceding plan year.

The regulations provide that, for purposes of section 432, if the plan received an extension of any amortization period under section 412(e), the extension is treated the same as an extension under section 431(d). Thus, such an extension is taken into account in determining endangered status under section 432(b)(1)(B) and emergence from critical status under section 432(e)(4)(B). In contrast, such an extension is not taken into account in determining whether a plan has or will have an accumulated funding deficiency for purposes of determining critical status under section 432(b)(2)(B) and (C).

The regulations describe the content of the annual certification required under section 432(b)(3) that must be sent to the plan sponsor and the IRS. The annual certification must be provided regardless of whether the plan is in endangered or critical status. If the plan is certified to be in endangered or critical status, then the certification must identify the plan, the plan sponsor, and the enrolled actuary who signs the certification; provide contact information for the plan sponsor and actuary; state whether or not the plan is in endangered or critical status for the plan year; and, if the certification is for a year other than the initial endangered year or the initial critical year, whether the plan is making the scheduled

progress described in the plan's funding improvement plan or rehabilitation plan. The regulations also provide an IRS address to which the certification is to be mailed.

The regulations also provide that the content of the annual certification and the IRS address to which it is mailed may be added to or modified in guidance of general applicability to be published in the Internal Revenue Bulletin. Such additional information may include, for instance, which endangered status or critical status standard(s) applies to the plan; supporting information for the classification; a description of the actuarial assumptions used in making the certification; and a projection of the plan's funded percentage for future years. The guidance may also require additional supporting information for certifications made prior to the issuance of the guidance.

The regulations provide guidance on the notice required under section 432(b)(3)(D).[2] In particular the regulations require that, in the case of a plan that is in critical status and which provides for benefits that would be restricted under section 432(f)(2), the notice for the initial critical year must tell participants about the restriction. A plan sponsor that sends the model notice provided by the Secretary of Labor pursuant to section 432(b)(3)(D)(iii) satisfies this requirement.

If a section 432(b)(3)(D) notice for such a plan was sent prior to the deadline in that section and the notice did not contain the disclosure regarding the immediate restriction on benefits under section 432(f)(2), then the regulations provide that the notice does not satisfy the requirements for notice under section 432(b)(3)(D). Accordingly, the restrictions under section 432(f)(2) do not apply as a result of the issuance of such a notice and the plan will not be treated as having issued the notice for purposes of the section 432(e)(8)(A)(ii) restriction on reducing adjustable benefits for participants whose benefit commencement dates are prior to the issuance of that notice. However, if additional notice that includes all of the information required under the regulations is provided prior to the required date for notice for the initial critical year under section 432(b)(3)(D) (that is, 30 days after the certification for the plan year), then the notice requirements of section 432(b)(3)(D) are satisfied as of the date of the later notice. In such a case, if the earlier notice contained the information described in section 432(b)(3)(D)(ii), then the date of that earlier notice will apply for purposes of the section 432(e)(8)(A)(ii) restriction.

The regulations reflect the rules of section 212(e)(2) of PPA under which a plan sponsor is permitted to send an early notice to plan participants. This early notice, which applies solely to the first plan year beginning after 2007, is only available if the plan actuary certifies to the plan sponsor that the plan is reasonably expected to be in critical status for that initial plan year. This preliminary certification that the plan is reasonably expected to be in critical status is different from the annual certification that the plan actuary must make; accordingly, the plan actuary must still certify whether the plan is in critical or endangered status (or in neither critical nor endangered status) for that plan year by the normal 90-day deadline for the certification.

Proposed Legislation

As of the date of the issuance of these proposed regulations, bills have been introduced in the House of Representatives and the Senate that would exclude from the section 432(f)(2) limitation on accelerated benefits a distribution with an annuity starting date that is before the date that the notice under section 432(b)(3)(D) is provided.[3] Section 1.432(a)–1(a)(3)(iii)(C) has been reserved in order to accommodate any enacted changes.

Effective/Applicability Dates

These regulations apply to plan years ending after [INSERT DATE OF PUBLICATION OF THESE REGULATIONS IN THE **Federal Register**], but only with respect to plan years that begin on or after January 1, 2008. These regulations do not address the sunset provision provided by PPA 06 section 221(c).

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information imposed by these proposed regulations will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. The estimated burden imposed by the collection of information contained in these proposed regulations is 0.75 hours per respondent. Moreover, most of this burden is attributable to the requirement for a qualified multiemployer defined benefit plan's enrolled actuary to provide a timely certification of the plan's funding status. In addition, if a plan is certified that it is or will be in critical or endangered status, the plan sponsor is required to notify the Department of Labor, the Pension Benefit Guaranty Corporation, the bargaining parties, participants, and beneficiaries of the status designation. For plans in critical status, the plan sponsor is required to include an explanation of the possibility that adjustable benefits may be reduced and that certain benefits are restricted as of the date the notice is sent. Pursuant to section 7805(f) of the Internal Revenue Code, this regulations has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (one signed and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department request comments on the clarity of the proposed rules and how they may be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of this regulation is Bruce Perlin, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 29 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

[2] Under section 432(b)(3)(D)(ii), the Secretary of Labor is to prescribe a model notice that a multiemployer plan may use to satisfy this notice requirement.

[3] See H.R. 3361(August 3, 2007) and S. 1974 (August 2, 2007) at sections 3(b)(1)(E) and 3(b)(2)(E)(ii). However, S. 1974, as amended and passed by the Senate on December 19, 2007, did not include this provision.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.432(a)–1 is added to read as follows:

§ 1.432(a)–1 General rules relating to section 432.

(a) *In general*—(1) *Overview.* This section provides rules relating to multiemployer plans (within the meaning of section 414(f)) that are in endangered status or critical status under section 432. Section 432 and this section only apply to multiemployer plans that are in effect on July 16, 2006. Paragraph (b) of this section sets forth definitions of terms that apply for purposes of section 432. Paragraph (c) of this section sets forth special rules for plans described in section 404(c) and for the treatment of nonbargained participation.

(2) *Plans in endangered status*—(i) *Plan sponsor must adopt funding improvement plan.* If a plan is in endangered status, the plan sponsor must adopt and implement a funding improvement plan that satisfies the requirements of section 432(c).

(ii) *Restrictions applicable to plans in endangered status.* If a plan is in endangered status, the plan and plan sponsor must satisfy the requirements of section 432(d)(1) during the funding plan adoption period specified in section 432(c)(8).

(iii) *Restrictions applicable after the adoption of funding improvement plan.* In the case of a plan that is in endangered status after adoption of the funding improvement plan, the plan and the plan sponsor must satisfy the requirements of section 432(d)(2) until the end of the funding improvement period.

(3) *Plans in critical status*—(i) *Plan sponsor must adopt rehabilitation plan.* If a plan is in critical status, the plan sponsor must adopt and implement a rehabilitation plan that satisfies the requirements of section 432(e).

(ii) *Restrictions applicable to plans in critical status.* If a plan is in critical status, the plan and the plan sponsor must satisfy the requirements of section 432(f)(4) during the rehabilitation plan adoption period as defined in section 432(e)(5). The plan must also apply the restrictions on single sum and other accelerated benefits set forth in paragraph (a)(3)(iii) of this section.

(iii) *Restrictions on single sums and other accelerated benefits*—(A) *In general.* A plan in critical status is required to provide that, effective on the date the notice of certification of the plan's critical status for the initial critical year under § 1.432(b)–1(e) is sent, no payment in excess of the monthly amount payable under a single life annuity (plus any social security supplements described in the last sentence of section 411(a)(9)), and no payment for the purchase of an irrevocable commitment from an insurer to pay benefits, may be made except as provided in section 432(f)(2). A plan amendment that provides for these restrictions does not violate section 411(d)(6).

(B) *Exceptions.* Pursuant to section 432(f)(2)(B), the restrictions under this paragraph (a)(3)(iii) do not apply to a benefit which under section 411(a)(11) may be immediately distributed without the consent of the participant or to any makeup payment in the case of a retroactive annuity starting date or any similar payment of benefits owed with respect to a prior period.

(C) [Reserved.]

(D) *Correction of erroneous restrictions.* If the notice described in § 1.432(b)–1(e) has been sent and the restrictions provided under this paragraph (a)(3)(iii) have been applied, and it is later determined that the restrictions should not have been applied, then the plan must correct any benefit payments that were restricted in error. Thus, for example, if pursuant to section 212(e)(2) of the Pension Protection Act of 2006, Public Law 109–280, 120 Stat. 780 the enrolled actuary for the plan certified that it was reasonably expected that the plan would be in critical status with respect to the first plan year beginning after 2007, and the notice described in § 1.432(b)–1(e)(3)(i) was sent, but the plan is not later certified to be in critical status for that plan year, then the plan must correct any benefit payments that were restricted after the notice was sent. Similarly, if the enrolled actuary for the plan certified that it was reasonably expected that the plan would be in critical status with respect to the first plan year beginning after 2007, and the notice described in § 1.432(b)–1(e)(3)(i) was sent before the first day of that plan year, the restriction on benefits under section 432(f)(2) first applies beginning on the first day of the first plan year beginning after 2007. If the plan restricts benefits before that date, then the plan must correct any improperly restricted benefits.

(iv) *Restrictions applicable after the adoption of rehabilitation plan.* In the case of a plan that is in critical status after the adoption of the rehabilitation plan, the plan and the plan sponsor must satisfy the requirements of section 432(f)(1) until the end of the rehabilitation period.

(b) *Definitions.* The following definitions apply for purposes of section 432 and the regulations:

(1) *Accumulated funding deficiency.* The term accumulated funding deficiency has the same meaning as the term accumulated funding deficiency under section 431(a).

(2) *Active participant.* The term active participant means a participant who is in covered service under the plan.

(3) *Bargaining party.* Except as provided in paragraph (c)(1) of this section, the term bargaining party means an employer who has an obligation to contribute under the plan and an employee organization which, for purposes of collective bargaining, represents plan participants employed by an employer which has an obligation to contribute under the plan.

(4) *Benefit commencement date.* The term benefit commencement date means the annuity starting date (or in the case of a retroactive annuity starting date, the date on which benefit payments begin).

(5) *Critical status.* A multiemployer plan is in critical status if the plan meets one of the tests set forth in § 1.432(b)-1(c).

(6) *Endangered status.* A plan is in endangered status if the plan meets one of the tests set forth in § 1.432(b)-1(b).

(7) *Funded percentage.* The term funded percentage means a fraction (expressed as a percentage) the numerator of which is the actuarial value of the plan's assets as determined under section 431(c)(2) and the denominator of which is the accrued liability of the plan, determined using the actuarial assumptions described in section 431(c)(3) and the unit credit funding method.

(8) *Funding improvement period for endangered or seriously endangered plans.* The term funding improvement period means the period that begins on the first day of the first plan year beginning after the earlier of the second anniversary of the date of the adoption of the funding improvement plan, or the expiration of the collective bargaining agreements that are in effect on the due date for the actuarial certification of endangered status for the initial endangered year and which cover, as of such due date, at least 75 percent of the active participants in the plan. The funding improvement period ends on the last day of the 10th year (15 years

for seriously endangered plans, except as provided in section 432(c)(5)) after it begins or, if earlier, the date of the change in status described in section 432(c)(4)(C).

(9) *Funding plan adoption period.* The term funding plan adoption period means the period that begins on the date of the actuarial certification for the initial endangered year and ends on the day before the first day of the funding improvement period.

(10) *Inactive participant.* The term inactive participant means —

(i) A participant who is not an active participant, (ii) A beneficiary under the plan, or

(iii) An alternate payee under the plan.

(11) *Initial critical year.* The term initial critical year means the first year for which the enrolled actuary for the plan has certified that the plan is or will be in critical status. If a plan is in critical status in one year, emerges from critical status in a subsequent year and then returns to critical status, the year of reentry into critical status is treated as the initial critical year with respect to subsequent years.

(12) *Initial endangered year.* The term initial endangered year means the first year for which the enrolled actuary for the plan has certified that the plan is in endangered status. If a plan is in endangered status in one year, changes from endangered status in a subsequent year and then returns to endangered status, the year of reentry into endangered status is treated as the initial endangered year with respect to subsequent years.

(13) *Nonbargained participant.* The term nonbargained participant means a participant in the plan whose participation is other than pursuant to a collective bargaining agreement within the meaning of section 7701(a)(46). A participant will not be treated as a nonbargained participant merely because the participant is no longer covered by the collective bargaining agreement solely as a result of retirement or severance from employment.

(14) *Obligation to contribute.* The term obligation to contribute means an obligation to contribute arising under one or more collective bargaining (or related) agreements or as a result of a duty under applicable labor-management relations law.

(15) *Plan sponsor.* Except as provided in paragraph (c)(1) of this section, the term plan sponsor means the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

(16) *Rehabilitation period.* The term rehabilitation period means the period that begins on the first day of the first plan year beginning after the earlier of the second anniversary of the date of the adoption of the rehabilitation plan, or the expiration of the collective bargaining agreements that are in effect on the due date for the actuarial certification of critical status for the initial critical year and which cover, as of such due date, at least 75 percent of the active participants in the plan. The rehabilitation period ends on the last day of the 10th year after it begins or, if earlier, the plan year preceding the plan year in which the plan has emerged from critical status as described in section 432(e)(4)(B).

(17) *Rehabilitation plan adoption period.* The term rehabilitation plan adoption period means the period that begins on the date of the actuarial certification for the initial critical year and ends on the day before the first day of the rehabilitation period.

(18) *Seriously endangered status.* A plan is in seriously endangered status if the plan is in endangered status and is described in both § 1.432(b)–1(b)(2) and (3).

(c) *Special rules*—(1) *Plan described in section 404(c).* In the case of a plan described in section 404(c), or a continuation of such a plan, the association of employers that is the employer settlor of the plan is treated as a bargaining party and is treated as the plan sponsor for purposes of section 432.

(2) *Plans covering both bargained and nonbargained participants.* In the case of an employer that contributes to a plan with respect to both employees who are covered by one or more collective bargaining agreements and employees who are nonbargained participants, if the plan is in endangered status or critical status, benefits of and contributions for the nonbargained participants (including surcharges on those contributions) are determined as if those nonbargained participants were covered under the employer's collective bargaining agreement in effect when the plan entered endangered or critical status that is the first to expire.

(3) *Plans covering nonbargained participants only.* In the case of an employer that contributes to a multiemployer plan only with respect to employees who are not covered by a collective bargaining agreement, section 432 and the regulations thereunder are applied as if the employer were the bargaining party, and its participation agreement with the plan were a collective bargaining agreement with a term ending on the first day of the plan year beginning after the employer is provided the schedules described in sections 432(c) and (e).

(d) *Effective/applicability date.* These regulations apply to plan years ending after March 18, 2008, but only with respect to plan years that begin on or after January 1, 2008.

Par. 3. Section 1.432(b)-1 is added to read as follows:

§ 1.432(b)-1 Determination of status and adoption of a plan.

(a) *In general.* This section provides rules relating to multiemployer plans (within the meaning of section 414(f)) that are in endangered status or critical status under section 432. Section 432 and this section only apply to multiemployer plans that are in effect on July 16, 2006. Paragraph (b) of this section sets forth the factors for determining whether a plan is in endangered status. Paragraph (c) of this section sets forth the factors for determining whether a plan is in critical status. Paragraph (d) sets forth the requirements for the annual certification by the plan's enrolled actuary. Paragraph (e) of this section describes the notice to employees that is required for plans that are in endangered or critical status.

(b) *Determination of endangered status*—(1) *In general.* A plan is in endangered status for a plan year if, as determined by the enrolled actuary for the plan, the plan is not in critical status for the plan year and if, as of the beginning of the plan year, the plan is described either in paragraph (b)(2) of this section or paragraph (b)(3) of this section. The enrolled actuary's determination of whether a plan is in endangered status is made under the rules of paragraph (d)(5) of this section.

(2) *Endangered status based on funding percentage.* A plan is described in this paragraph (b)(2) for a plan year if the plan's funded percentage for such plan year is less than 80 percent.

(3) *Endangered status based on projection of funding deficiency.* A plan is described in this paragraph (b)(3) for a plan year if the plan has an accumulated funding deficiency for such plan year (or is projected to have such an accumulated funding deficiency for any of the 6 succeeding plan years), taking into account any extension of amortization periods under section 431(d).

(c) *Critical Status*—(1) *In general.* A multiemployer plan is in critical status for a plan year if, as determined by the enrolled actuary for the plan, the plan is described in one or more of paragraphs (c)(2) through (c)(6) of this section as of the beginning of the plan

year. The enrolled actuary's determination of critical status must be made in accordance with the rules of paragraph (d)(5) of this section. Notwithstanding paragraph (d)(5)(iii) of this section, for purposes of applying the critical status tests described in paragraphs (c)(2) and (c)(5) of this section, the actuary must assume that the terms of all collective bargaining agreements pursuant to which the plan is maintained for the current plan year continue in effect for succeeding plan years.

(2) *Critical status based on 6-year projection of benefit payments.* A plan is described in this paragraph (c)(2) if the funded percentage of the plan is less than 65 percent, and the present value of all nonforfeitable benefits projected to be payable under the plan during the current plan year and each of the 6 succeeding plan years (plus administrative expenses for such plan years) is greater than the sum of—

(i) The fair market value of plan assets, plus

(ii) The present value of the reasonably anticipated employer contributions for the current plan year and the 6 succeeding plan years.

(3) *Critical status based on short term funding deficiency.* A plan is described in this paragraph (c)(3) if—

(i) The plan has an accumulated funding deficiency for the current plan year, not taking into account any extension of amortization periods under section 431(d), or

(ii) The plan is projected to have an accumulated funding deficiency for any of the 3 succeeding plan years (4 succeeding plan years if the funded percentage of the plan is 65 percent or less), not taking into account any extension of amortization periods under section 431(d).

(4) *Critical status based on contributions less than normal cost plus interest.* A plan is described in this paragraph (c)(4) if—

(i) The present value of the reasonably anticipated employer and employee contributions for the current plan year is less than the sum of

(A) The plan's normal cost (determined under the unit credit funding method), and

(B) Interest (determined at the rate used for determining costs under the plan) on the excess if any of—

(*1*) The accrued liability of the plan (determined using the actuarial assumptions described in section 431(c)(3) and the unit credit funding method) over

(*2*) The actuarial value of assets determined under section 431(c)(2),

(ii) The present value, as of the beginning of the current plan year, of nonforfeitable benefits of inactive participants is greater than the present value of nonforfeitable benefits of active participants, and

(iii) The plan has an accumulated funding deficiency for the current plan year (or is projected to have such a deficiency for any of the 4 succeeding plan years), not taking into account any extension of amortization periods under section 431(d).

(5) *Critical status based on 4-year projection of benefit payments.* A plan is described in this paragraph (c)(5) if the present value of all benefits projected to be payable under the plan during the current plan year or any of the 4 succeeding plan years (plus administrative expenses for such plan years) is greater than the sum of—

(i) The fair market value of plan assets, plus

(ii) The present value of the reasonably anticipated employer contributions for the current plan year and each of the 4 succeeding plan years.

(6) *Critical status based on failure to meet emergence criteria.* A plan is described in this paragraph (c)(6) if—

(i) The plan was in critical status for the immediately preceding plan year, and

(ii) The enrolled actuary for the plan has certified that the plan is projected to have an accumulated funding deficiency for the plan year or any of the 9 succeeding plan years, without regard to the use of the shortfall funding method but taking into account any extensions of the amortization periods under section 431(d).

(d) *Annual certification by the plan's enrolled actuary*—(1) *In general.* Not later than the 90th day of each plan year of a multiemployer plan, the enrolled actuary for the plan must certify to the Secretary of the Treasury and to the plan sponsor—

(i) Whether or not the plan is in endangered status for such plan year;

(ii) Whether or not the plan is or will be in critical status for such plan year, and

(iii) In the case of a plan which is in a funding improvement or rehabilitation period, whether or not the plan is making the scheduled progress in meeting the requirements of its funding improvement or rehabilitation plan.

(2) *Transmittal of certification*—(i) *Transmittal to the plan sponsor.* The certification of plan status described in paragraph (d)(1) must be submitted to the plan sponsor at the address stated by the plan sponsor on their Annual Report (Form 5500) or such other address as the plan sponsor may designate in writing for receipt of this certification.

(ii) *Transmittal to the Secretary of the Treasury.* Except as provided in guidance of general applicability to be published in the Internal Revenue Bulletin, the annual certification of plan status described in paragraph (d)(1) must be transmitted to the Secretary of the Treasury by mailing the certification to: Internal Revenue Service, Employee Plans Compliance Unit, Group 7602 (SE:TEGE:EP), Room 1700—17th Floor, 230 S. Dearborn Street, Chicago, IL 60604.

(3) *Content of annual certification*—(i) *In general.* The annual certification must contain the information described in this paragraph (d)(3). The Secretary may add to or otherwise modify the requirements in this paragraph (d)(3) in guidance of general applicability to be published in the Internal Revenue Bulletin.

(ii) *Plan identification.* The annual certification must include the name of the plan; the plan number; the name, address, and telephone number of the plan sponsor; and the plan year for which the certification is being made.

(iii) *Enrolled actuary identification.* The annual certification must include the name, address and telephone number of the enrolled actuary signing the certification; the actuary's enrollment identification number; the actuary's signature, and the date of the signature.

(iv) *Information on plan status.* The annual certification must state whether the plan is in endangered status (which includes seriously endangered status); critical status, or neither endangered nor critical status.

(v) *Information on scheduled progress.* If the annual certification is made with respect to a plan year that is within the plan's funding improvement period or rehabilitation period arising from a prior certification of endangered or critical status, the actuary must also certify whether or not the plan is making scheduled progress in meeting the requirements of its funding improvement or rehabilitation plan.

(4) *Penalty for failure to secure timely actuarial certification.* A failure of a plan's actuary to certify the plan's status under this paragraph (d) by the date specified in paragraph (d)(1) of this section is treated as a failure or refusal by the plan administrator to file the annual report required to be filed with the Secretary of Labor under section 101(b)(4) of the Employee Retirement Income Security Act of 1974.

(5) *Actuarial projections of assets and liabilities*—(i) *In general.* In making the determinations and projections under

section 432(b) and this section, the enrolled actuary for the plan must make projections required for the current and succeeding plan years of the current value of the assets of the plan and the present value of all liabilities to participants and beneficiaries under the plan for the current plan year as of the beginning of such year. These projections must be based on reasonable actuarial estimates, assumptions, and methods in accordance with section 431(c)(3) and that offer the actuary's best estimate of anticipated experience under the plan. Notwithstanding the previous sentence, the actuary is permitted to rely on the plan sponsor's projection of activity in the industry provided under paragraph (d)(5)(iii) of this section. The projected present value of liabilities as of the beginning of such year must be determined based on the most recent information reported on the most recent of either—

(A) The actuarial statement required under section 103(d) of the Employee Retirement Income Security Act of 1974 that has been filed with respect to the most recent year, or

(B) The actuarial valuation for the preceding plan year.

(ii) *Determinations of future contributions.* Any actuarial projection of plan assets shall assume either—

(A) Reasonably anticipated employer contributions for the current and succeeding plan years, assuming that the terms of the one or more collective bargaining agreements pursuant to which the plan is maintained for the current plan year continue in effect for succeeding plan years, or

(B) That employer contributions for the most recent plan year will continue indefinitely, but only if the enrolled actuary for the plan determines there have been no significant demographic changes that would make such assumption unreasonable.

(iii) *Projected industry activity.* The plan sponsor shall provide any necessary projection of activity in the industry, including future covered employment, to the plan actuary. For this purpose, the plan sponsor must act reasonably and in good faith.

(6) *Treatment of amortization extensions under section 412(e).* For purposes of section 432, if the plan received an extension of any amortization period under section 412(e), the extension is treated the same as an extension under section 431(d). Thus, such an extension is not taken into account in determining whether a plan has or will have an accumulated funding deficiency under paragraph (c)(3) and (c)(4) of this section, but it is taken into account in determining whether a plan has or will have an accumulated funding deficiency under paragraph (b)(3) of this section.

(e) *Notice of endangered or critical status*—(1) *In general.* In any case in which the enrolled actuary for the plan certifies that a multiemployer plan is or will be in endangered or critical status for a plan year, the plan sponsor must, not later than 30 days after the date of the certification, provide notification of the endangered or critical status to the participants and beneficiaries, the bargaining parties, the Pension Benefit Guaranty Corporation, and the Secretary of Labor.

(2) *Plans in critical status.* If it is certified that a multiemployer plan is or will be in critical status for a plan year, the plan sponsor must include in the notice an explanation of the possibility that adjustable benefits (as defined in section 432(e)(8)) may be reduced, and such reductions may apply to participants and beneficiaries whose benefit commencement date is on or after the date such notice is provided for the first plan year in which the plan is in critical status. If the plan provides benefits that are restricted under section 432(f)(2), the notice must also include an explanation that the plan cannot pay single sums and similar benefits described in section 432(f)(2) that are greater than the monthly amount due under a single life annuity. A plan sponsor that sends the model notice issued by the Secretary of Labor pursuant to section 432(b)(3)(D)(iii) satisfies this requirement.

(3) *Transition rules*—(i) *Early notice permitted.* If, after August 17, 2006, the enrolled actuary for the plan certifies that a plan is reasonably expected to be in critical status with respect to the first plan year beginning after 2007, then the notice described in this paragraph (e) may be provided before the date the actuary certifies the plan is in critical status for that plan year. The ability to provide early notice does not extend the otherwise applicable deadline for providing the notice under paragraph (e)(1) of this section.

(ii) *Reformation of prior notice.* If notice has been provided prior to the date required under paragraph (e)(1) of this section, but the notice did not include all of the information described in paragraph (e)(2) of this section, then that notice will not satisfy the requirements for notice under section 432(b)(3)(D). Accordingly, the restrictions under section 432(f)(2) will not apply as a result of the issuance of such a notice. However, if prior to the date notice is required to be provided under paragraph (e)(1) of this section additional notice is provided that includes all of the information required under paragraph (e)(2) of this section, then the notice requirements of section 432(b)(3)(D) are satisfied as of the date of that additional notice and the restrictions of section 432(f)(2) will apply beginning on that date. In such a case, the date of the earlier notice will still apply for purposes of section 432(e)(8)(A)(ii) provided that the earlier notice included all of the information required under section 432(b)(3)(D)(ii).

(f) *Effective applicability date.* These regulations apply to plan years ending after [*INSERT DATE OF PUBLICATION OF THESE REGULATIONS IN THE FEDERAL REGISTER*] but only with respect to plan years that begin on or after January 1, 2008.

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 08–1044 Filed 3–14–08; 9:03 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2007–0907; FRL–8541–4]

Approval and Promulgation of Air Quality Implementation Plans; Indiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a request submitted by the Indiana Department of Environmental Management on July 20, 2007, as supplemented on December 19, 2007, to revise the Indiana State Implementation Plan (SIP). The submission revises the Indiana Administrative Code (IAC) by amending the definition of ''References to Code of Federal Regulations,'' to update of the references to the Code of Federal Regulations to refer to the 2006 edition. The rule revision also makes minor corrections to amend the definition of ''nonphotochemically reactive hydrocarbons'' or ''negligibly photochemically reactive compounds,'' and to amend the definition of ''volatile organic compound'' or ''VOC.''

In the final rules section of this **Federal Register**, EPA is approving the SIP revision as a direct final rule without prior proposal, because EPA views this as a noncontroversial revision and anticipates no adverse comments.

A detailed rationale for the approval is set forth in the direct final rule. If we do not receive any adverse comments in

response to these direct final and proposed rules, we do not contemplate taking any further action in relation to this proposed rule. If EPA receives adverse comments, we will withdraw the direct final rule and will respond to all public comments in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received on or before April 17, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2007–0907 by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: mooney.john@epa.gov.*
- *Fax:* (312) 886–5824.
- *Mail:* John M. Mooney, Chief, Criteria Pollutant Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
- *Hand Delivery:* John M. Mooney, Chief, Criteria Pollutant Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Charles Hatten, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6031, *hatten.charles@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule, and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the Rules section of this **Federal Register**.

Dated: March 3, 2008.

Bharat Mathur,

Acting Regional Administrator, Region 5.

[FR Doc. E8–5288 Filed 3–17–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

49 CFR Part 39

RIN 2105–AB87

Transportation for Individuals With Disabilities: Passenger Vessels

AGENCY: Office of the Secretary, U.S. Department of Transportation (DOT).

ACTION: Proposed rule; reopening of comment period and notice of public meeting.

SUMMARY: DOT will hold a public meeting on April 8–9, 2008, in connection with its NPRM on passenger vessel disability access guidelines.

DATES: The comment period for the proposed rule published on January 23, 2007 (72 FR 2833), is reopened April 8, 2008, through April 23, 2008, to allow for the posting of comments related to the meeting held on April 8–9, 2008, from 9 a.m. to 4 p.m., Eastern Standard Time.

ADDRESSES: The meeting will be held at the DOT Headquarters located at 1200 New Jersey Avenue, SE., Washington, DC, in the DOT Conference Center, Rooms 8/9/10. Please enter at the New Jersey Avenue entrance, on the corner of M ST, SE., and New Jersey Avenue, SE. This entrance is accessible for individuals with disabilities.

FOR FURTHER INFORMATION CONTACT: For further information regarding the meeting, contact Brett Jortland, Attorney, DOT Office of the General Counsel, at 202.366.9314 or *brett.jortland@dot.gov*.

SUPPLEMENTARY INFORMATION: DOT will host a public meeting to discuss issues of interest raised as a result of DOT's Notice of Proposed Rulemaking on January 23, 2007 (72 FR 2833), regarding transportation for individuals with disabilities on passenger vessels.

Public attendance at the meeting is limited to space available. The meeting will be physically accessible to individuals with disabilities. DOT is housed in a secure government building that requires visitors to pass a security screening and be escorted within the building. Meeting attendees should plan to arrive suitably early to allow for clearance of security and escort to the meeting room. Parking in the neighborhood surrounding DOT Headquarters is extraordinarily limited, so meeting attendees are strongly advised to travel to the meeting by Metro; the Navy Yard Station on Metro's Green Line serves DOT headquarters.

The meeting will begin with introductory presentations from DOT regarding the NPRM, the Access Board regarding its companion rulemaking, and the passenger vessel industry to ensure that meeting attendees all have baseline knowledge of the types of vessels proposed for coverage under this regulation. Following these presentations, the meeting will proceed with open discussions moderated by a neutral facilitator. The discussions will follow the items on the meeting agenda. The agenda for the meeting will be placed in the docket for this rulemaking no later than March 21, 2008. The docket can be found at www.regulations.gov, under docket number OST–2007–26829.

Individuals wishing to attend the meeting must RSVP to Brett Jortland with their name, organization (if any), and identify whether they are representing persons with disabilities, the passenger vessel industry, or other interests. In addition to space limitations, DOT reserves the right to limit attendance to ensure that all viewpoints are represented in the meeting's discussions. Individuals requiring special services, such as sign language interpretation or other auxiliary aids, are asked to indicate this in their RSVP, which must be received no later than April 3, 2008.

Dated: March 10, 2008.

Neil Eisner,

Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation.

[FR Doc. 08–1036 Filed 3–12–08; 4:01 pm]

BILLING CODE 4910–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 071121736–7619–01]

RIN 0648–AR78

Magnuson-Stevens Act Provisions; Experimental Permitting Process, Exempted Fishing Permits, and Scientific Research Activity

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; extension of comment period.

SUMMARY: NMFS extends the public comment period on the proposed rule containing revised definitions for certain regulatory terms, and procedural and technical changes to the regulations addressing scientific research activities, exempted fishing, and exempted educational activities under the Magnuson-Stevens Fishery Conservation and Management Act. NMFS has received a request to extend the comment period for the proposed rule beyond its current 90-day comment period. The extension of the comment period for an additional 15 days is intended to ensure that NMFS provides adequate time for fishery management councils, stakeholders and members of the public to comment on the proposed revisions. The comment deadline is extended from March 20, 2008, to April 4, 2008.

DATES: Comments must be received on or before April 4, 2008.

ADDRESSES: You may submit comments, identified by RIN 0648–AR78, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*
- Fax: 301–713–1193, Attn: Jason Blackburn
- Mail: Alan Risenhoover, Director, Office of Sustainable Fisheries, 1315 East-West Highway, SSMC3, Silver Spring, MD 20910, Attn: EFP Comments

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Jason Blackburn at 301–713–2341, or by e-mail at *jason.blackburn@noaa.gov*.

SUPPLEMENTARY INFORMATION: A proposed rule that covers NMFS' proposed revisions to the regulations addressing scientific research activities, exempted fishing, and exempted educational activities under the Magnuson-Stevens Fishery Conservation and Management Act was published on December 21, 2007 (72 FR 72657), with a comment period ending date of March 20, 2008. After receiving several requests to extend the comment period, NMFS has decided to extend it for an additional 15 days through April 4, 2008.

Authority: 16 U.S.C. 971 *et seq.*, 1801 *et seq.*

Dated: March 13, 2008.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

[FR Doc. E8–5425 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 73, No. 53
Tuesday, March 18, 2008

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

March 13, 2008.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Foreign Agricultural Service

Title: Sugar Imported for Exports as Refined Sugar or as a Sugar-Containing Product, or Used in Production of Certain Polyhydric Alcohols.

Omb Control Number: 0551–0015.

Summary of Collection: Regulation 7 CFR Part 1530 authorizes the Foreign Agricultural Service (FAS) to issue import licenses to enter raw cane sugar (exempt from the tariff-rate quota for the raw cane sugar imports and the related requirements) on the condition that an equivalent quantity of refined sugar be: (1) Exported as refined sugar; (2) exported as an ingredient in sugar containing products; or (3) used in production of certain polyhydric alcohols. The purpose of the sugar import-licensing program is to assist U.S. sugar manufacturers, refiners, and processors in making U.S. products price competitive on the world market; and facilitate the use of domestic refining capacity.

Need and Use of the Information: FAS will collect information to verify that the world-priced sugar is actually exported and not diverted onto the domestic market, thereby undermining the objectives of politically sensitive U.S. sugar policies. This collection enables USDA to regularly monitor the status of program participants in an effort to ensure that they remain within Program parameters. Without the collection, there would be increased opportunity to purposely divert sugar onto the domestic market.

Description of Respondents: Business or other for-profit.

Number of Respondents: 200.

Frequency Of Responses: Reporting; Quarterly; Annually.

Total Burden Hours: 717.

Foreign Agricultural Service

Title: Specialty Sugar Import Certificates.

Omb Control Number: 0551–0025.

Summary of Collection: The Secretary of Agriculture each year announces the U.S. sugar import quantity that will be subject to the tariff-rate quotas, including specialty sugars for each fiscal year (October 1–September 30). In order to grant licenses, ensure that imported specialty sugar does not disrupt the current domestic support program, and maintain administrative control over the program, an application with certain specific information must be collected from those who wish to participate in the program established by the regulation. Importers are required to supply specific information to the Secretary and the Foreign Agricultural Service (FAS), in order to be granted a certificate to import specialty sugar. The information is supplied to U.S. Customs officials in order to certify that the sugar being imported is ''specialty sugar.''

Need and Use of the Information: The collected information will be used to: (1) Determine whether applicants for the program meet the regulation's eligibility criteria; (2) ensure that sugar to be imported is specialty sugar and meets the requirements of the regulation; (3) audit participants' compliance with the regulation; and (4) prevent entry of world-priced program sugar from entering the domestic commercial market instead of domestic specialty sugar market. Without the collection of this information the Certifying Authority would not have any basis on which to make a decision on whether a certificate should be granted, and would not have the ability to monitor sugar imports under this program.

Description of Respondents: Business or other for-profit.

Number of Respondents: 25.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 30.

Foreign Agricultural Service

Title: Export Assistance Programs.

Omb Control Number: 0551–0031.

Summary of Collection: The Office of Trade Program (OTP) provides vital services within the Foreign Agricultural Service (FAS) of the U.S. Department of Agriculture. It facilitates trade contacts between U.S. exporters and foreign buyers seeking U.S. food and agricultural products. All of the assistance offered is designed to promote U.S. agricultural exports by helping American exporters make contact with export agents, trading companies, importers and foreign buyers thus creating opportunities to sell their products in overseas markets. The specific programs covered by this request for OMB information collection authority are: U.S. Suppliers List, Buyer Alert, Trade Shows, Foreign Buyers List, Export Directory of U.S. Food Distribution Companies, Madigan

Award. The authority for these program falls under 7 U.S. C. Part 1761, 7 U.S.C. Part 5693 and 7 U.S.C. part 1765b. FAS will collect information using a combination of forms and telephone interviews.

Need and Use of the Information: FAS will collect information on contact names, mailing addresses, telephones, fax, email, and websites. The main purpose for collecting the information is to foster trade contacts in an effort to facilitate greater export of U.S. agriculture food, forestry, and fishery products. The databases are used to recruit U.S. exporters, importers, and buyers to participate in market development activities sponsored by USDA. These databases must be updated periodically to maintain the integrity and usefulness to the trade community.

Description of Respondents: Business or other for-profit.

Number of Respondents: 31,910.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 3,632.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E8–5393 Filed 3–17–08; 8:45 am]

BILLING CODE 3410–10–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

March 13, 2008

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Agricultural Marketing Service

Title: Tobacco Reports.

OMB Control Number: 0581–0004.

Summary of Collection: The Tobacco Statistics Act of 1929 (7 U.S.C. 501–508) provides for the collection and publication of statistics of tobacco by USDA with regard to quantity of leaf tobacco in all forms in the United States and Puerto Rico, owned by or in the possession of dealers, manufacturers, growers' cooperative associations, and others with the exception of the original growers of the tobacco. The information furnished under the provisions of this Act shall be used only for statistical purposes for which it is supplied.

Need and Use of the Information: The basic purpose of the information collection is to ascertain the total supply of unmanufactured tobacco available to domestic manufacturers and to calculate the amount consumed in manufactured tobacco products. This data is also used for the calculation of production quotas for individual types of tobacco and for price support calculations. Without the information USDA would not be able to disseminate marketing information as directed and authorized in the Act.

Description of Respondents: Business or other for-profit.

Number of Respondents: 57.

Frequency of Responses: Reporting: Quarterly.

Total Burden Hours: 204.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E8–5397 Filed 3–17–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

March 13, 2008.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Forest Service

Title: Prince William Sound User Experience Survey.

Omb Control Number: 0596–NEW.

Summary of Collection: Prince William Sound (PWS), the geographic heart of the Chugach National Forest (CNF), was severely impacted by the *Exxon Valdez* oil spill (EVOS) in 1989. In the aftermath of the spill, a council of federal and state trustees (EVOS Trustee Council) was awarded criminal and civil restitution funds to help with

the recovery, and the evaluation of the recovery, of injured natural resources and human services. The Prince William Sound User Experience Survey aims to advance understanding of the status of recovery for the recreation/tourism human service still defined by EVOS trustees as ''recovering'' and not yet fully ''recovered.'' It also aims to identify potential impacts to the recovery of other injured goods and services.

Need and Use of the Information: The survey will aid in evaluating the potential for conflict among user groups and the possibility of displacement resulting from those interactions. Additionally, it will investigate recreation/tourism user perceptions about lingering oil and evaluate how those perceptions may affect experience. The data will be used by managers to determine use patterns for the PWS, giving decision makers insight into the recovery of injured resources and human services, which were redistributed around the PWS in the aftermath of EVOS. The data will also provide managers with the ability to protect and restore EVOS injured resources and human services during a time of increasing human use in the PWS.

Description of Respondents: Individuals or households.

Number of Respondents: 500.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 167.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E8–5404 Filed 3–17–08; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; 2008 Estimate of Micronesians

AGENCY: U.S. Census Bureau.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration, written comments must be submitted on or before May 19, 2008.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Claire Shook-Finucane via U.S. Census Bureau, 4600 Silver Hill Road, Room 6H154A, Washington, DC 20233, or (301) 763–6092, or via the Internet at *claire.shook-finucane@census.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The U.S. Census Bureau plans to request clearance from the Office of Management and Budget to survey the residents of Guam and the Commonwealth of the Northern Mariana Islands (CNMI) to collect basic demographic data to meet the needs of The Compact of Free Association.

The Compact of Free Association between the United States, the Federated States of Micronesia, and the Republic of the Marshall Islands went into effect in 1986, and with the Republic of Palau in 1994. The Compact, a joint congressional-executive agreement, provides United States funds to these island areas for a range of development programs, the use of United States currency, immigration privileges, federal processing of applications for air services, United States transportation of mail, and other benefits. In exchange, each Pacific nation guarantees the United States exclusive use of its land for military purposes.

As stated in the Compact of Free Association Amendments Act of 2003 an enumeration of Micronesians shall be conducted every five years in Hawaii, Guam, CNMI, and America Samoa for disbursing Compact funds.[1] The U.S. Department of the Interior decided to use Census' American Community Survey (ACS) data to estimate the number of Micronesians living in Hawaii and, due to the small population of Micronesians living in American Samoa, to use Census 2000 data to determine the number of Micronesians living there. The Department of the Interior has requested that the Census Bureau conduct a survey to estimate the number of Micronesians living in Guam and CNMI. Based on the Compact, this Survey of Micronesians will be fielded in 2008 and will need to provide information to meet three data needs: place of birth, residential tenure, and children of Micronesians. Only questions pertaining to these needs will be requested. The questions and data collection procedures will follow the ACS and U.S. Island Area Census, including a content reinterview phase.

[1] Public Law 108–188.

II. Method of Collection

In Guam, approximately 45 sample blocks totaling about 3,300 sample addresses will be listed and enumerated. In CNMI, approximately 30 sample blocks totaling about 2,000 sample addresses will be listed and enumerated. The data will be collected via in-person interviews. The content reinterview will sample approximately 400 respondents via a telephone number provided by the respondents.

III. Data

OMB Control Number: None.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Individuals or households.

Estimated Number of Respondents: 4,770.

Estimated Time Per Response: 32 minutes.

Estimated Total Annual Burden Hours: 2,544.

Estimated Total Annual Cost: $0.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code, Section 8(b) and Public Law 108–188, The Compact of Free Association Amendments Act of 2003.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 12, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–5324 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; Annual Wholesale Trade Survey

AGENCY: U.S. Census Bureau.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration, written comments must be submitted on or before May 19, 2008.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to John Miller, U.S. Census Bureau, Room 8K081, Washington, DC 20233–6500, (301) 763–2758.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Annual Wholesale Trade Survey (AWTS) covers companies with employment that are primarily engaged in merchant wholesale trade in the United States, including wholesalers that take title of the goods they sell such as jobbers, industrial distributors, exporters, importers, and manufacturers' sales branches and offices. Additionally, the AWTS includes companies that do not take title of the goods they sell such as agents, merchandise or commodity brokers, commission merchants, and electronic business-to-business markets. The Bureau of Economic Analysis uses this information to improve the inventory valuation adjustments applied to estimates of the Gross Domestic Product, and considers these data vital inputs to the National Income and Product accounts and annual input-output tables.

The estimates produced from the AWTS are based on a probability sample and are published on the North American Industry Classification System basis. The sample design consists of small, medium, and large businesses requested to report sales on one of six questionnaires (the three classifications that follow are broken into separate questionnaires for company or single establishment reporters). Merchant wholesale establishments, excluding manufacturers' sales branches and offices, are requested to provide sales, e-commerce, inventories, method of inventory valuation, inventories held outside the United States, purchases, and operating expenses. Manufacturers' sales branches and offices are requested to provide sales, e-commerce, inventories, method of inventory valuation, inventories held outside the United States, and operating expenses. The agents, merchandise or commodity brokers, commission merchants, and electronic business-to-business markets are requested to provide commissions, sales on their own account, e-commerce, and operating expenses. The sample, consisting of approximately 8,900 businesses, is drawn from the Business Register, which contains all Employer Identification Numbers (EINs) and listed establishment locations. The sample is updated quarterly to reflect employer ''births'' and ''deaths''; adding new employer businesses identified in the Business and Professional Classification Survey and deleting firms and EINs when it is determined they are no longer active.

Data from the AWTS are published at the United States summary level for selected wholesale industries approximately fourteen months after the end of the collection year.

II. Method of Collection

The information will be collected by mail, Internet, fax, and telephone.

III. Data

OMB Control Number: 0607–0195.

Form Number: SA–42, SA–42A, SA–42(MSBO), SA–42A(MSBO), SA–42(AGBR), SA–42A(AGBR).

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 8,887.

Estimated Time per Response: 31 minutes.

Estimated Total Annual Burden Hours: 4,592.

Estimated Total Annual Cost: $0.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13, United States Code, sections 182, 224, and 225.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 12, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–5325 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Docket 16–2008]

Foreign–Trade Zone 39 – Dallas/Fort Worth, Texas, Application for Subzone, Dal–Tile Corporation, (Flooring and Home Furnishing Products Distribution), Sunnyvale and Mesquite, Texas

An application has been submitted to the Foreign–Trade Zones (FTZ) Board (the Board) by the Dallas/Fort Worth International Airport Board, grantee of FTZ 39, requesting special–purpose subzone status for the flooring and home furnishing products warehouse/distribution facilities of Dal–Tile Corporation (Dal–Tile), at sites in Sunnyvale and Mesquite, Texas. The application was submitted pursuant to the Foreign–Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on March 7, 2008.

The proposed subzone is located at two sites in Dallas County, Texas: Site

1 (623,000 sq. ft. on 35 acres) – located at 199 Planters Road, Sunnyvale; and, Site 2 (396,750 sq. ft. on 24 acres) -- located at 510 N. Peachtree, Suite 200, Mesquite. The facilities will be used for quality control, shading, cleaning, repackaging, marking, warehousing and distribution of domestic and foreign–origin flooring and home furnishing products for both the U.S. market and for re–export. None of the activities which Dal–Tile is proposing to perform under zone procedures would constitute manufacturing or processing under the FTZ Board's regulations. The application indicates that FTZ procedures would be used to support Dal–Tile's Texas–based distribution activity in competition with facilities abroad.

FTZ procedures would exempt Dal–Tile from customs duty payments on foreign products that are re–exported (less than 5 percent of the facilities' shipments). On its domestic shipments, duty payments would be deferred until the products are entered for consumption. The company may also realize certain logistical benefits related to the use of direct delivery and weekly customs entry procedures. The application indicates that the savings from FTZ procedures would help improve the facilities' international competitiveness.

In accordance with the Board's regulations, a member of the FTZ staff has been designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is May 19, 2008;. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15–day period (to June 2, 2008).

A copy of the application will be available for public inspection at each of the following locations: U.S. Department of Commerce, Export Assistance Center, 808 Throckmorton St., Fort Worth, TX 76102–6315; and, Office of the Executive Secretary, Foreign–Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, D.C. 20230–0002. For further information, contact Diane Finver at Diane__Finver@ita.doc.gov or (202) 482–1367.

Dated: March 7, 2008.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–5459 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

Order No. 1548

Approval for Expansion of Authority for Subzone 103A, Imation Enterprise Corp. (Data Storage Products), Wahpeton, North Dakota Area

Pursuant to its authority under the Foreign–Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign–Trade Zones Board (the Board) adopts the following Order:

Whereas, Imation Enterprise Corp. (Imation), operator of Subzone 103A, has requested authority to expand the scope of manufacturing activity conducted under zone procedures within Subzone 103A at the Imation facilities in the Wahpeton, North Dakota area (FTZ Docket 27–2007, filed 7/23/2007);

Whereas, notice inviting public comment has been given in the **Federal Register** (72 FR 41705, 7/31/2007);

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that approval of the application is in the public interest;

Now, therefore, the Board hereby orders:

The application to expand the scope of manufacturing authority under zone procedures within Subzone 103A, is approved, subject to the FTZ Act and the Board's regulations, including § 400.28.

Signed at Washington, DC, this 7th day of March 2008.

David M. Spooner,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign–Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–5432 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1549]

Approval for Expansion of Manufacturing Authority for Subzone 86D; Tesoro Refining and Marketing Company; (Oil Refinery) Anacortes, WA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Port of Tacoma, grantee of FTZ 86, has requested authority on behalf of Tesoro Refining and Marketing Company, to expand the scope of manufacturing activity conducted under zone procedures within Subzone 86D at the Tesoro Refining and Marketing Company oil refinery complex in Anacortes, Washington (FTZ Docket 22–2007, filed 07–10–2007);

Whereas, notice inviting public comment has been given in the **Federal Register**(72 FR 39051, 7/17/07); and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations would be satisfied, and that approval of the application would be in the public interest if approval is subject to the conditions listed below;

Now, therefore, the Board hereby approves the expansion of the scope of activity at Subzone 86D for the manufacture of petroleum products at the Tesoro Refining and Marketing Company oil refinery complex located in Anacortes, Washington, as described in the application and the **Federal Register** notice, subject to the FTZ Act and the Board's regulations, including § 400.28, and further subject to the following conditions:

1. Foreign status (19 CFR 146.41, 146.42) products consumed as fuel for the refinery shall be subject to the applicable duty rate.

2. Privileged foreign status (19 CFR 146.41) shall be elected on all foreign merchandise admitted to the subzone, except that non-privileged foreign (NPF) status (19 CFR 146.42) may be elected on refinery inputs covered under HTSUS Subheadings #2709.00.10, #2709.00.20, #2710.11.25, #2710.11.45, #2710.19.05, #2710.19.10, #2710.19.45, #2710.91.00, #2710.99.05, #2710.99.10, #2710.99.16, #2710.99.21 and #2710.99.45 which are used in the production of:

—petrochemical feedstocks and refinery by-products (examiners report, Appendix ''C'');

—products for export;

—and, products eligible for entry under HTSUS # 9808.00.30 and #9808.00.40 (U.S. Government purchases).

Signed at Washington, DC, this 7th day of March 2008.

David M. Spooner,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–5421 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

Order No. 1541

Approval of Manufacturing Authority, Within Foreign–Trade Zone 26, Atlanta, Georgia, Perkins Shibaura Engines LLC (Diesel Engines)

Pursuant to its authority under the Foreign–Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u) (the Act), the Foreign–Trade Zones Board (the Board) adopts the following Order:

Whereas, Georgia Foreign–Trade Zone, Inc., grantee of FTZ 26, has requested authority under Section 400.28 (a)(2) of the Board's regulations on behalf of Perkins Shibaura Engines LLC, to manufacture diesel engines under FTZ procedures within FTZ 26 Site 6, Griffin, Georgia (FTZ Docket 24–2007, filed 7–19–2007);

Whereas, notice inviting public comment has been given in the **Federal Register** (72 FR 40833, 7–25–2007);

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that approval of the application is in the public interest;

Now, therefore, the Board hereby grants authority for the manufacture of diesel engines within FTZ 26 for Perkins Shibaura Engines LLC, as described in the application and **Federal Register** notice, subject to the Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 7th day of March 2008.

David M. Spooner,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign–Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–5441 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1550]

Expansion of Foreign-Trade Zone 185 Culpeper County, VA

Pursuant to its authority under the Foreign-Trade Zones (FTZ) Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Culpeper County Chamber of Commerce, Inc., grantee of Foreign-Trade Zone No. 185, submitted an application to the Board for authority to expand FTZ 185 to include a site in Augusta County, Virginia, adjacent to the Front Royal Customs and Border Protection port of entry (FTZ Docket 23–2007, filed 7/13/2007);

Whereas, notice inviting public comment was given in the **Federal Register** (72 FR 40273, 7/24/2007) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to expand FTZ 185 is approved, subject to the Act and the Board's regulations, including section 400.28.

Signed at Washington, DC, this 7th day of March 2008.

David M. Spooner,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–5422 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign Trade Zones Board

Order No. 1546

Grant of Authority for Subzone Status, Candies Shipbuilders, L.L.C. (Shipbuilding), Houma, Louisiana

Pursuant to its authority under the Foreign–Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign–Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign–Trade Zones Act provides for ''. . . the establishment . . . of foreign–trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' and authorizes the Board to grant to qualified corporations the privilege of establishing foreign–trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board's regulations (15 CFR Part 400) provide for the establishment of special–purpose subzones when existing zone facilities cannot serve the specific use involved, and when the activity results in a significant public benefit and is in the public interest;

Whereas, the Port of South Louisiana Commission, grantee of FTZ 124, has made application for authority to establish special–purpose subzone status at the shipbuilding facility of Candies Shipbuilders, L.L.C., located in Houma, Louisiana (FTZ Docket 17–2007, filed 4–20–2007);

Whereas, notice inviting public comment was given in the **Federal Register**(72 FR 21218, 4–30–2007); and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations would be satisfied, and that approval of the application would be in the public interest if approval were given subject to the standard shipyard restriction on foreign steel mill products;

Now, therefore, the Board hereby grants authority for subzone status for activity related to shipbuilding and repair at the shipyard of Candies Shipbuilders, L.L.C., in Houma, Louisiana (Subzone 124L), at the location described in the application, subject to the FTZ Act and the Board's regulations, including Section 400.28, and subject to the following special conditions: (1) any foreign steel mill products admitted to the subzone, including plate, angles, shapes, channels, rolled steel stock, bars, pipes and tubes, not incorporated into merchandise otherwise classified, and which is used in manufacturing, shall be subject to customs duties in accordance with applicable law, unless the Executive Secretary determines that the same item is not then being produced by a domestic steel mill; and, (2) Candies Shipbuilders, L.L.C., shall annually advise the Board's Executive Secretary (§ 400.28(a)(3)) as to significant new contracts with appropriate information concerning foreign purchases otherwise dutiable, so that the Board may consider whether

any foreign dutiable items are being imported for manufacturing in the subzone primarily because of subzone status and whether the Board should consider requiring customs duties to be paid on such items.

Signed at Washington, DC, this 7th day of March 2008.

David M. Spooner

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign–Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–5437 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

Order No. 1544

Grant of Authority for Subzone Status, Lilly del Caribe, Inc. (Pharmaceutical Manufacturing), Carolina, Guayama and Mayaguëz, PR

Pursuant to its authority under the Foreign–Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign–Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign–Trade Zones Act provides for ''...the establishment... of foreign–trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' and authorizes the Foreign–Trade Zones Board to grant qualified corporations the privilege of establishing foreign–trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board's regulations (15 CFR Part 400) provide for the establishment of special–purpose subzones when existing zone facilities cannot serve the specific use involved, and when the activity results in significant public benefit and is in the public interest;

Whereas, the Puerto Rico Industrial Development Company, grantee of Foreign–Trade Zone 7, has made application to the Board for authority to establish a special–purpose subzone at the pharmaceutical manufacturing facilities of Lilly del Caribe, Inc., located in Carolina, Guyama and Mayaguëz, Puerto Rico (FTZ Docket 44–2007, filed 8/27/07);

Whereas, notice inviting public comment was given in the **Federal Register** (72 FR 51407, 9/7/07); and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds the requirements of the FTZ Act and the Board's regulations are satisfied, and that approval of the application would be in the public interest;

Now, therefore, the Board hereby grants authority for subzone status for activity related to pharmaceutical manufacturing at the facilities of Lilly del Caribe, Inc., located in Carolina,Guayama and Mayaguëz, Puerto Rico (Subzone 7K), as described in the application and **Federal Register** notice, and subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 7th day of March 2008.

David M. Spooner,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign–Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–5439 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1552]

Grant of Authority for Subzone Status; Eastern Shipbuilding Group; (Shipbuilding); Panama City and Allanton, FL

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones Act provides for ''* * * the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' and authorizes the Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board's regulations (15 CFR part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and when the activity results in a significant public benefit and is in the public interest;

Whereas, the Port of Panama City, Florida, grantee of FTZ 65, has made application for authority to establish special-purpose subzone status at the shipbuilding facilities of Eastern Shipbuilding Group, located in Panama City and Allanton, Florida (FTZ Docket 21–2007, filed 6–5–2007);

Whereas, notice inviting public comment was given in the **Federal Register** (72 FR 32278, 6–12–2007); and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations would be satisfied, and that approval of the application would be in the public interest if approval were given subject to the standard shipyard restriction on foreign steel mill products;

Now, therefore, the Board hereby grants authority for subzone status for activity related to shipbuilding and repair at the shipyards of Eastern Shipbuilding Group, in Panama City and Allanton, Florida (Subzone 65A), at the locations described in the application, subject to the FTZ Act and the Board's regulations, including Section 400.28, and subject to the following special conditions: (1) Any foreign steel mill product admitted to the subzone, including plate, angles, shapes, channels, rolled steel stock, bars, pipes and tubes, not incorporated into merchandise otherwise classified, and which is used in manufacturing, shall be subject to customs duties in accordance with applicable law, unless the Executive Secretary determines that the same item is not then being produced by a domestic steel mill; (2) Eastern Shipbuilding Group shall annually advise the Board's Executive Secretary (§ 400.28(a)(3)) as to significant new contracts with appropriate information concerning foreign purchases otherwise dutiable, so that the Board may consider whether any foreign dutiable items are being imported for manufacturing in the subzone primarily because of subzone status and whether the Board should consider requiring customs duties to be paid on such items; and, (3) all foreign-origin textile floor coverings and carpet products (classified under HTSUS 5702.50) must be admitted to the subzone in privileged foreign status (19 CFR 146.41) or domestic status (19 CFR 146.43).

Signed at Washington, DC, this 7th day of March 2008.

David M. Spooner,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–5424 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

A–421–811

Purified Carboxymethylcellulose from the Netherlands: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: March 18, 2008.

FOR FURTHER INFORMATION CONTACT: Stephen Bailey or Angelica Mendoza, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0193 or (202) 482–3019, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 24, 2007, the Department of Commerce (''the Department'') published a notice of initiation of administrative review of the antidumping duty order on purified carboxymethylcellulose from the Netherlands, covering the period July 1, 2006, through June 30, 2007. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 72 FR 48613 (August 24, 2007). The preliminary results for this review are currently due no later than April 1, 2008.

Statutory Time Limits

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), requires the Department to issue the preliminary results of an administrative review within 245 days after the last day of the anniversary month of an order for which a review is requested and the final results of review within 120 days after the date on which the preliminary results are published in the **Federal Register**. If the Department determines that it is not practicable to complete the review within the specified time period, section 751(a)(3)(A) of the Act allows the Department to extend these deadlines to a maximum of 365 days and 180 days, respectively.

Extension of Time Limits for Preliminary Results

The deadline for the preliminary results of this administrative review is currently April 1, 2008. The Department has determined that completion of the preliminary results within the statutory time period is not practicable. On January 16, 2008, the Department issued a section A–C supplemental questionnaire to respondent CP Kelco B.V. On February 15, 2008, the Department issued CP Kelco B.V. a supplemental cost questionnaire requesting additional information. CP Kelco B.V. submitted its sections A–C supplemental sales questionnaire response and its section D supplemental cost questionnaire response on February 14, 2008, and February 29, 2008, respectively. The Department requires additional time to review and analyze CP Kelco B.V.'s questionnaire responses, and to determine whether to issue additional supplemental sales and cost questionnaires to CP Kelco B.V.

Therefore, given the additional time needed to conduct a complete analysis for this administrative review, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time period for completion of the preliminary results to 365 days. Therefore, the preliminary results are now due no later than July 30, 2008. The final results continue to be due no later than 120 days after publication of the notice of the preliminary results.

This notice is published in accordance with sections 751(a)(3)(A) and 777(i)(1) of the Act.

Dated: March 11, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–5417 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–401–808

Purified Carboxymethylcellulose from Sweden: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: March 18, 2008.

FOR FURTHER INFORMATION CONTACT: Patrick Edwards or Angelica Mendoza, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–8029 or (202) 482–3019, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 24, 2007, the Department of Commerce (''the Department'') published a notice of initiation of administrative review of the antidumping duty order on purified carboxymethylcellulose from Sweden, covering the period July 1, 2006, through June 30, 2007. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 72 FR 48613 (August 24, 2007). The preliminary results for this review are currently due no later than April 1, 2008.

Statutory Time Limits

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), requires the Department to issue the preliminary results of an administrative review within 245 days after the last day of the anniversary month of an order for which a review is requested and the final results of review within 120 days after the date on which the preliminary results are published. If it is not practicable to complete the review within the time period, section 751(a)(3)(A) of the Act allows the Department to extend these deadlines to a maximum of 365 days and 180 days, respectively.

Extension of Time Limits for Preliminary Results

The deadline for the preliminary results of this administrative review is currently April 1, 2008. The Department has determined that completion of the preliminary results within the statutory time period is not practicable. On December 20, 2007, the Department initiated a sales–below-cost investigation for CP Kelco A.B. and requested that the company respond to Section D of the Department's antidumping duty (cost) questionnaire. *See* Letter from Angelica L. Mendoza, Program Manager, to CP Kelco A.B., dated December 20, 2007, and attached memorandum. CP Kelco A.B. submitted is response to Section D on January 8, 2008. The Department has not yet released a supplemental cost questionnaire to CP Kelco A.B. On February 1, 2008, the Department issued a section A through C supplemental questionnaire to respondent CP Kelco A.B. CP Kelco A.B. submitted its sections A through C supplemental sales questionnaire response on February 26, 2008. The Department requires additional time to review and analyze CP Kelco A.B.'s questionnaire responses, to issue a supplemental cost questionnaire, to issue additional supplemental sales questionnaires if

necessary, and to conduct verification of the questionnaire responses, if necessary.

Therefore, given the additional time needed to conduct a complete analysis for this administrative review, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time period for completion of the preliminary results to 365 days. Therefore, the preliminary results are now due no later than July 30, 2008. The final results continue to be due no later than 120 days after publication of the notice of the preliminary results.

This notice is published in accordance with sections 751(a)(3)(A) and 777(i)(1) of the Act.

Dated: March 11, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–5420 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–888

Floor–Standing, Metal–Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On September 11, 2007, the U.S. Department of Commerce (''the Department'') published the preliminary results of the second administrative review of the antidumping duty order on ironing tables from the People's Republic of China (''PRC''). *See Floor–Standing, Metal–Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 72 FR 51781 (September 11, 2007) (''*AR2 Preliminary Results*''). This review covers exports from Since Hardware (Guangzhou) Co., Ltd. (''Since Hardware''). The period of review (''POR'') is August 1, 2005, through July 31, 2006. For these final results, the Department revised and continued to apply the Since Hardware supplier price benchmark analysis. Furthermore, the Department revised its calculation of the surrogate financial ratios. Therefore, the final results differ from the preliminary results. *See* ''Final Results of Review'' section below.

EFFECTIVE DATE: March 18, 2008.

FOR FURTHER INFORMATION CONTACT: Bobby Wong or Michael Quigley, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0409 or (202) 482–4047, respectively.

SUPPLEMENTARY INFORMATION:

Background

We published in the **Federal Register** the preliminary results of the second administrative review on September 11, 2007. *See AR2 Preliminary Results.*

Following the *AR2 Preliminary Results*, on October 1, 2007, Since Hardware submitted surrogate financial information to value factors of production. On October 11, 2007, Home Products International Inc. (''petitioner'') and Since Hardware submitted case briefs. On October 16, 2007, both petitioner and Since Hardware also submitted rebuttal briefs.

Scope of the Order

For purposes of this order, the product covered consists of floor–standing, metal–top ironing tables, assembled or unassembled, complete or incomplete, and certain parts thereof. The subject tables are designed and used principally for the hand ironing or pressing of garments or other articles of fabric. The subject tables have full–height leg assemblies that support the ironing surface at an appropriate (often adjustable) height above the floor. The subject tables are produced in a variety of leg finishes, such as painted, plated, or matte, and they are available with various features, including iron rests, linen racks, and others. The subject ironing tables may be sold with or without a pad and/or cover. All types and configurations of floor–standing, metal–top ironing tables are covered by this review.

Furthermore, this order specifically covers imports of ironing tables, assembled or unassembled, complete or incomplete, and certain parts thereof. For purposes of this order, the term ''unassembled'' ironing table means a product requiring the attachment of the leg assembly to the top or the attachment of an included feature such as an iron rest or linen rack. The term ''complete'' ironing table means product sold as a ready–to-use ensemble consisting of the metal–top table and a pad and cover, with or without additional features, *e.g.* iron rest or linen rack. The term ''incomplete'' ironing table means product shipped or sold as a ''bare board'' *i.e.*, a metal–top table only, without the pad and cover with or without additional features, *e.g.* iron rest or linen rack. The major parts or components of ironing tables that are intended to be covered by this order under the term ''certain parts thereof'' consist of the metal top component (with or without assembled supports and slides) and/or the leg components, whether or not attached together as a leg assembly. The order covers separately shipped metal top components and leg components, without regard to whether the respective quantities would yield an exact quantity of assembled ironing tables.

Ironing tables without legs (such as models that mount on walls or over doors) are not floor–standing and are specifically excluded. Additionally, tabletop or countertop models with short legs that do not exceed 12 inches in length (and which may or may not collapse or retract) are specifically excluded.

The subject ironing tables were previously classified under Harmonized Tariff Schedule of the United States (''HTSUS'') subheading 9403.20.0010. Effective July 1, 2003, the subject ironing tables are classified under new HTSUS subheading 9403.20.0011. The subject metal top and leg components are classified under HTSUS subheading 9403.90.8040. Although the HTSUS subheadings are provided for convenience and for Customs and Border Protection (''CBP'') purposes, the Department's written description of the scope remains dispositive.

Separate Rates

Since Hardware requested a separate, company–specific antidumping duty rate. In the *AR2 Preliminary Results*, we found that Since Hardware had met the criteria for the application of a separate antidumping duty rate. *Preliminary Results*, 72 FR at 51782.

We have not received any information since the *Preliminary Results* with respect to Since Hardware that would warrant reconsideration of our separate–rates determination. Therefore, we have assigned an individual dumping margin to Since Hardware for this review period.

Analysis of Comments Received

All issues raised in the briefs are addressed in the Memorandum to David M. Spooner, Assistant Secretary for Import Administration, from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, regarding the Issues and Decision Memorandum accompanying the *Final Results in the 2005–2006 Administrative Review of Floor–Standing, Metal–Top Ironing Tables and Certain Parts Thereof from*

the People's Republic of China, (February 10, 2008) (''I&D Memorandum''), which is hereby adopted by this notice. A list of the issues raised, all of which are in the Issues and Decision Memorandum, is attached to this notice as Appendix I. Parties can find a complete discussion of all issues raised in the briefs and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit (''CRU''), room 1117 of the Department of Commerce. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Web at http://trade.gov/ia. The paper copy and electronic version of the Issues and Decision Memorandum are identical in content.

Changes since the Preliminary Results

Based on the comments received from interested parties, we have made company–specific changes to certain surrogate value calculations that affect the margin calculations for Since Hardware as discussed below.

1) Benchmark Methodology:

For these final results, the Department has determined to apply the benchmark analysis consistent with the methodology applied in the preliminary results. However, for the *Preliminary Results*, the Department inadvertently failed to remove export sales into NME countries from the benchmark analysis. Therefore, for these final results, the Department corrected this inadvertent error and revised the benchmark analysis to exclude export sales into NME countries from the analysis. This is consistent with the Department's recent practice. *See Oil Country Tubular Goods (''OCTG''), Other Than Drill Pipe, from Korea: Final Results of Antidumping Duty Administrative Review*, 71 FR 13091 and accompanying Issues and Decision Memorandum at Comment ''Issue: The use of China, a non–market economy, as the basis for normal value'' (March 14, 2006). *See also, Husteel Company, Ltd. v. United States*, CIT Court No. 06–00075 (where the Department is currently defending this position before the CIT). For a more detailed discussion, see the Issues and Decision Memorandum at Comment 3; and the March 10, 2008, Memorandum to the File; From Blaine Wiltse, International Trade Compliance Analyst and Bobby Wong, Senior International Trade Complaince Analyst; Regarding Second Antidumping Administrative Review of Floor–standing, Metal–top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Since Hardware (Guangzhou) Co., Ltd. (''Since Hardware'') Analysis Memorandum for the Final Results, accompanying these final results.

2) Carriage Inward:

For these final results, consistent the Department's practice in recent reviews, the Department has included Infiniti Modules freight–in expenses in the calculation of the denominator used to determine Since Hardware's surrogate financial ratios. *See Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 72 FR 71355 (December 18, 2007) (''*Tables & Chairs Final*''). For a more detailed discussion, see, Comment 2 of the Issues and Decision Memorandum accompanying these final results.

3) Plywood:

In the preliminary results of the instant review, the Department inadvertently applied the incorrect harmonized tariff schedule code to value plywood. For these final results, the Department has corrected this clerical error (for further detail). *See* Comment 4 of the Issues and Decision Memorandum accompanying these final results.

Final Results of Review

We preliminarily determine that the following antidumping duty margins exist:

Exporter	Margin (percent)
Since Hardware (Guangzhou) Co., Ltd.	0.34 % (de minimis)

For details on the calculation of the antidumping duty weighted–average margin for each company, *see* See March 10, 2008, Memorandum to the File; From Blaine Wiltse, International Trade Compliance Analyst and Bobby Wong, Senior International Trade Compliance Analyst; Regarding Second Antidumping Administrative Review of Floor–standing, Metal–top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Since Hardware (Guangzhou) Co., Ltd. (''Since Hardware'') Analysis Memorandum for the Final Results. The public version of this memorandum is on file in the CRU.

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Tariff Act of 1930, as amended (''the Act'') and 19 CFR 351.212(b), the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review. For assessment purposes, where possible, we calculated importer–specific assessment rates for subject ironing tables from the PRC via *ad valorem* duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of these final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) for Since Hardware, the Department has calculated a *de minimis* margin for these final results, and therefore no cash deposit will be required for this company; (2) for previously investigated or reviewed PRC and non–PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter–specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, including those companies for which this review has been rescinded, the cash deposit rate will be the PRC–wide rate of 157.68 percent; and (4) for all non–PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non–PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Interested Parties

This notice also serves as the final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and in the subsequent assessment of double antidumping duties.

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return/destruction or conversion to judicial protective order of proprietary

information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Failure to comply is a violation of the APO.

This administrative review and this notice are published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: March 10, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–5415 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–580–825

Oil Country Tubular Goods, Other Than Drill Pipe, from Korea: Final Results of Antidumping Duty Administrative ReviewAGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce

SUMMARY: On September 11, 2007, the Department of Commerce (''the Department'') published the preliminary results of the administrative review of the antidumping duty order on oil country tubular goods, other than drill pipe (''OCTG''), from Korea for the period (''POR'') August 1, 2005 through July 25, 2006. *See Oil Country Tubular Goods, Other Than Drill Pipe, from Korea: Preliminary Results of Antidumping Duty Administrative Review*, 72 FR 51793 (September 11, 2007) (*Preliminary Results*). This review covers the following manufacturers/exporters: Husteel Co., Ltd. (''Husteel''), SeAH Steel Corporation (''SeAH''), and Nexteel Co. Ltd. (Nexteel). Based on our analysis of the comments received, we have made changes to the *Preliminary Results*. For the final dumping margins see the ''Final Results of Review'' section below.

EFFECTIVE DATE: March 18, 2008.

FOR FURTHER INFORMATION CONTACT: Scott Lindsay, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, DC 20230, telephone: (202) 482–0780.

SUPPLEMENTARY INFORMATION:

Background

On June 22, 2007, pursuant to section 751(d)(2) of the Tariff Act of 1930 (''the Act'') and 19 CFR 351.222(i)(2)(i), the Department revoked this antidumping duty order effective July 25, 2006. *See Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico; Revocation of Antidumping Duty Orders Pursuant to Second Five-year (Sunset) Reviews*, 72 FR 34442–34443 (June 22, 2007) (*Revocation*). Therefore, the POR of this administrative review is August 1, 2005 through July 25, 2006.

On September 11, 2007, the Department published in the **Federal Register** the preliminary results of the administrative review of the antidumping duty order on OCTG from Korea. *See Preliminary Results*. Since the *Preliminary Results*, the following events have occurred. We received case briefs on October 11, 2007, and rebuttal briefs on October 16, 2007. On January 7, 2008, pursuant to section 751(a)(3)(A) of the Act, the Department extended the deadline for issuing the final results by 60 days to March 10, 2008. *See Notice of Extension of Time Limit for Final Results of Administrative Review: Oil Country Tubular Goods, Other Than Drill Pipe, from Korea*, 72 FR 1205 (January 7, 2007).

Scope of the Antidumping Duty Order

The products covered by this order are OCTG, hollow steel products of circular cross-section, including only oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, whether or not conforming to American Petroleum Institute (''API'') or non–API specifications, whether finished or unfinished (including green tubes and limited service OCTG products). This scope does not cover casing or tubing pipe containing 10.5 percent or more of chromium, or drill pipe. The products subject to this order are currently classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') under sub–headings: 7304.29.10.10, 7304.29.10.20, 7304.29.10.30, 7304.29.10.40, 7304.29.10.50, 7304.29.10.60, 7304.29.10.80, 7304.29.20.10, 7304.29.20.20, 7304.29.20.30, 7304.29.20.40, 7304.29.20.50, 7304.29.20.60, 7304.29.20.80, 7304.29.30.10, 7304.29.30.20, 7304.29.30.30, 7304.29.30.40, 7304.29.30.50, 7304.29.30.60, 7304.29.30.80, 7304.29.40.10, 7304.29.40.20, 7304.29.40.30, 7304.29.40.40, 7304.29.40.50, 7304.29.40.60, 7304.29.40.80, 7304.29.50.15, 7304.29.50.30, 7304.29.50.45, 7304.29.50.60, 7304.29.50.75, 7304.29.60.15, 7304.29.60.30, 7304.29.60.45, 7304.29.60.60, 7304.29.60.75, 7305.20.20.00, 7305.20.40.00, 7305.20.60.00, 7305.20.80.00, 7306.20.10.30, 7306.20.10.90, 7306.20.20.00, 7306.20.30.00, 7306.20.40.00, 7306.20.60.10, 7306.20.60.50, 7306.20.80.10, and 7306.20.80.50.

As a result of changes to the Harmonized Tariff Schedule, effective February 2, 2007, the subject merchandise is also classifiable under the following additional HTS item numbers: 7304.29.31.10, 7304.29.31.20, 7304.29.31.30, 7304.29.31.40, 7304.29.31.50, 7304.29.31.60, 7304.29.31.80, 7304.29.41.10, 7304.29.41.20, 7304.29.41.30, 7304.29.41.40, 7304.29.41.50, 7304.29.41.60, 7304.29.41.80, 7304.29.61.15, 7304.29.61.30, 7304.29.61.45, 7304.29.61.60, 7304.29.61.75, 7306.29.10.30, 7306.29.10.90, 7306.29.20.00, 7306.29.31.00, 7306.29.41.00, 7306.29.60.10, 7306.29.60.50, 7306.29.81.10, and 7306.29.81.50. The HTSUS sub–headings are provided for convenience and customs purposes only. The written description remains dispositive of the scope of the order.

Analysis of Comments Received

The issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the *Issues and Decisions Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Oil Country Tubular Goods (''OCTG'') from Korea,* March 10, 2008 (*Issues and Decisions Memorandum*), which is hereby adopted by this notice. The Issues and Decisions Memorandum is on file in the Central Records Unit (CRU), room 1117 of the Department of Commerce main building and can be accessed directly at http://ia.ita.doc.gov/frn. The paper copy and electronic version of the *Issues and Decisions Memorandum* are identical in content. A list of the issues addressed in the *Issues and Decisions Memorandum* is appended to this notice.

Changes Since the Preliminary Results

Based on our analysis of the comments received, we have made changes in the calculations for the final dumping margin. The changes are discussed in detail in the Issues and Decisions Memorandum and in the Memorandum from Scott Lindsay, Case Analyst, to the File: Analysis of Husteel Corporation (''Husteel'') for the Final Results of the Administrative Review of Oil Country Tubular Goods, Other Than Drill Pipe from Korea, and Memorandum from Scott Lindsay, Case Analyst, to the File: Analysis of SeaH Steel Corporation (''SeAH'') for the

Final Results of the Administrative Review of Oil Country Tubular Goods, Other Than Drill Pipe from Korea, dated March 10, 2008, on file in the CRU. There were no changes related to Nexteel from the Preliminary Results.

Final Results of Review

As a result of our review, we determine that the following weighted–average margins exist for the period August 1, 2005, through July 25, 2006:

Manufacturer/Exporter	Margin (percent)
SeAH Steel Corporation	0.65
Husteel Co., Ltd.	0.29(de minimis)
Nexteel Co., Ltd.	0.00

Cash Deposit Requirements

Pursuant to section 751(d)(2) of the Act and 19 CFR 351.222(i)(2)(i), the Department revoked this order and notified U.S. Customs and Border Protection (CBP) to discontinue suspension of liquidation and collection of cash deposits on entries of the subject merchandise entered or withdrawn from warehouse on or after July 25, 2006, the effective date of revocation of this antidumping duty AD order. *See Revocation*.

Assessment Rates

The Department will determine, and (CBP) shall assess, antidumping duties on all appropriate entries, pursuant to section 751(a)(1)(B) of the Act, and 19 CFR 351.212(b). The Department calculated importer- specific duty assessment rates (or, when the importer was unknown by the respondent, customer–specific duty assessment rates) on the basis of the ratio of the total amount of antidumping duties calculated for the examined sales observations involving each importer to the total entered value of the examined sales observations for that importer. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. This clarification will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the ''All Others'' rate if there is no rate for the intermediate company(ies) involved in the transaction. For a discussion of this clarification, *see Notice of Policy Concerning Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding APOs

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

These final results of administrative review and this notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: March 10, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

APPENDIX

List of Issues

1. Husteel's Profit and Selling Expense Ratios for Constructed Value
2. Adjustments to Husteel's G&A Expense Ratio
3. SeAH's Further Manufacturing and Selling Expense Ratios

[FR Doc. E8–5416 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–427–827

Sodium Metal from France: Postponement of Preliminary Determination of Antidumping Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: March 18, 2008.

FOR FURTHER INFORMATION CONTACT: Dennis McClure or Joy Zhang, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482–5973 or (202) 482–1168, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 13, 2007, the Department of Commerce (the Department) initiated the antidumping duty investigation of sodium metal from France. *See Sodium Metal from France: Notice of Initiation of Antidumping Duty Investigation*, 72 FR 65295 (November 20, 2007). The notice of initiation stated that the Department would issue its preliminary determination for this investigation no later than 140 days after the date of issuance of the initiation, in accordance with section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act). The preliminary determination is currently due no later than April 1, 2008.

Postponement of Preliminary Determination

On February 29, 2008, the petitioner, E.I. DuPont de Nemours & Co. Inc., made a timely request pursuant to section 733(c)(1)(A) of the Act and 19 CFR 351.205(b)(2) and (e) for a 50-day postponement of the preliminary determination. The petitioner requested postponement of the preliminary determination in order to allow for additional time to evaluate the respondent's questionnaire response in this investigation. Under section 733(c)(1)(A) of the Act, if the petitioner makes a timely request for an extension of the period within which the preliminary determination must be made under subsection (b)(1), then the Department may postpone making the preliminary determination under subsection (b)(1) until not later than the 190th day after the date on which the administrative authority initiated the investigation. For the reason identified by the petitioner and because there are no compelling reasons to deny the request, the Department is postponing the deadline for the preliminary determination under section 733(c)(1)(A) of the Act by 50 days to May 21, 2008. The deadline for the final determination will continue to be 75 days after the date of the preliminary determination, unless extended.

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: March 12, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–5414 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; NWHI Mokupapapa Discovery Center Exhibit Evaluation

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before May 19, 2008.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Linda Schubert, 808.933.8184 or *linda.schubert@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

Mokupapapa Discovery Center (Center) is an outreach arm of Papahanaumokuakea Marine National Monument that reaches 60,000 people each year in Hilo, Hawaii. The Center was created four years ago to help raise support for the creation of a National Marine Sanctuary in the Northwestern Hawaiian Islands. Since that time, the area has been proclaimed a Marine National Monument and the main messages we are trying to share with the public have changed to better reflect the new monument status and the joint management by the three co-trustees of the Monument. We therefore are seeking to find out if people visiting our Center are getting our new messages by conducting an optional exit survey.

II. Method of Collection

Surveys will be conducted by in-person interview as people exit the Center. Interviewers will record responses on paper, and later transfer them to an electronic database.

III. Data

OMB Control Number: None.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Individuals or households.

Estimated Number of Respondents: 250.

Estimated Time Per Response: 7 minutes.

Estimated Total Annual Burden Hours: 29.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 12, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–5323 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF70

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

AGENCY: National Marine Fisheries Service (NMFS); National Oceanic and Atmospheric Administration (NOAA); Commerce.

ACTION: Notice; request for comments.

SUMMARY: The Assistant Regional Administrator for Sustainable Fisheries, Northeast Region, NMFS (Assistant Regional Administrator) has made a preliminary determination that the subject Exempted Fishing Permit (EFP) application from the University of New England (UNE) and the University of New Hampshire (UNH) that would allow Northeast multispecies vessels to possess spiny dogfish for a spiny dogfish life history study contains all the required information and warrants further consideration. The Assistant Regional Administrator has also made a preliminary determination that the activities authorized under the EFP would be consistent with the goals and objectives of the Spiny Dogfish Fishery Management Plan (FMP). However, further review and consultation may be necessary before a final determination is made.

DATES: Comments on this document must be received on or before April 2, 2008.

ADDRESSES: Comments may be submitted by e-mail to *dogfish.efp@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: ''Comments on UNE dogfish possession EFP proposal.'' Written comments should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 1 Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope, ''Comments on UNE dogfish possession EFP proposal.'' Comments may also be sent via facsimile (fax) to (978) 281–9135.

FOR FURTHER INFORMATION CONTACT: Ryan Silva, Cooperative Research Program Specialist, phone: 978–281–9326, fax: 978–281–9135.

SUPPLEMENTARY INFORMATION: The FMP implemented a semi-annual quota. When a semi-annual quota is projected to be harvested, NMFS closes the fishery until the next semi-annual quota opens. During a dogfish closure, no vessel may fish for or possess dogfish. A dogfish closure is currently in effect through April 30, 2008.

As part of a continuing research project, UNE, in collaboration with the UNH, is investigating Gulf of Maine dogfish age and growth, and size at sexual maturity characteristics. The applicant states that current dogfish life history data need updating, particularly in light of recent stock declines and potential regional variability in life history traits. The project investigators are attempting to develop a more accurate aging tool, which would

improve age and size at sexual maturity determinations. The applicant notes that these data would provide critical life history information needed for effective dogfish management decisions, particularly for the Gulf of Maine.

The applicant would collect at least 10 dogfish samples per month per sex, but not to exceed 50 dogfish per month. The applicant would require only partial samples from May, June, November, and December (maximum of 25 per month) to complete their monthly sample objectives. Therefore, the maximum number of dogfish landed under this EFP would not exceed 600 individuals.

Samples would be collected during commercial NE multispecies fishing trips in areas open to commercial NE multispecies regulations in statistical areas 125 and 132. Vessels would fish with otter trawl and gillnet gear that is fully compliant with NE multispecies regulations and adhere to the following conditions: Possess 50 or fewer dogfish per trip; all live dogfish bycatch would be returned to the ocean as quickly as possible; no dogfish may be landed for sale; dogfish would not be targeted during the fishing trips.

If approved, participating vessels would not be allowed to possess or retain more than 50 dogfish on any trip, and no dogfish may be sold.

Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs. The applicant may place requests for minor modifications and extensions to the EFP throughout the year. EFP modifications and extensions may be granted without further notice if they are deemed essential to facilitate completion of the proposed research and minimal so as not to change the scope or impact of the initially approved EFP request.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: March 12, 2008.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–5348 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG32

Unified Synthesis Product Development Committee

AGENCY: National Oceanic and Atmospheric Administration (NOAA, Commerce.

ACTION: Notice of establishment of Climate Change Science Program (CCSP) Unified Synthesis Product Development Committee (USPDC) and announcement of public meeting.

SUMMARY: Establishment of the USPDC will result in the provision of advice to the Under Secretary of Commerce on the content of a report that will integrate and evaluate the findings of the U.S. Climate Change Science Program in the context of current and projected global climate change trends, both human-induced and natural, and analyze the effects of current and projected climate change on: ecosystems and biological diversity; agriculture; energy production and use; land and water resources; transportation; and human health and social systems. This advice will be used by NOAA to develop a final product that addresses these topic areas. Following establishment of the USPDC, the first Committee meeting will be held. All sessions of the meeting will be open to the public.

DATES: The meeting will convene at 8 a.m. on Monday, March 31, 2008 and adjourn at 5:30 p.m. on Tuesday, April 1, 2008. Meeting information, including the names of the Lead Author team nominees, will be available online on the NOAA Climate Program Office CCSP website: *http://www.climate.noaa.gov/index.jsp?pg=./ccsp/index.html.*

ADDRESSES: The first meeting of the USPDC will be held at the Hilton O'Hare Airport Hotel, Chicago, IL.

FOR FURTHER INFORMATION CONTACT: Dr. Christopher D. Miller, the USPDC Designated Federal Official (DFO) and the Program Manager, NOAA/OAR Climate Program Office Climate Change Data and Detection Program Element, Climate Program Office, 1315 East-West Highway, Room 12239, Silver Spring, Maryland 20910; telephone 301–734–1241, e-mail: *Christopher.D.Miller@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Background

In accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 2, and the General Services Administration (GSA) rule of Federal Advisory Committee Management, 41 CFR part 102–3, and after consultation with GSA, the Secretary of Commerce has determined that the establishment of the National Oceanic and Atmospheric Administration (NOAA) Climate Change Science Program (CCSP) Unified Synthesis Product Development Committee (USPDC) is in the public interest, in connection with the performance of duties imposed on the Department by law. The USPDC will consist of no more than 35 members to be appointed by the Under Secretary to assure a balanced representation among preeminent scientists, educators, and experts reflecting the full scope of the scientific issues addressed in the CCSP Unified Synthesis Product. The USPDC will function solely as an advisory body, and in compliance with the provisions of the Federal Advisory Committee Act. Its charter will be filed under the Act 15 days from the date of publication of this notice in the **Federal Register**.

Status

Please note that meeting times and agenda topics described below are subject to change. The meeting will be open to public participation and will include a 30-minute public comment period on March 31 from 8 a.m. to 8:30 a.m. (check website to confirm this time). In general, each individual or group making a verbal presentation will be limited to a total time of five (5) minutes. Written comments will also be accepted and (at least 35 copies) should be received by the USPDC Designated Federal Official (DFO) by March 20, 2008 to provide sufficient time for review. Written comments received after March 20 will be distributed to the USPDC, but may not be reviewed prior to the meeting date. Seats will be available to the public on a first-come, first-served basis.

Matters To Be Considered

The meeting will discuss plans for development of the First Draft of the Climate Change Science Program (CCSP) Unified Synthesis Product.

Dated: March 11, 2008.

Mary M. Glackin,

Deputy Under Secretary for Oceans and Atmosphere.

[FR Doc. E8–5440 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–12–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG36

Small Takes of Marine Mammals Incidental to Specified Activities; Port of Anchorage Marine Terminal Redevelopment Project, Anchorage, Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; proposed incidental harassment authorization; receipt of application for subsequent letters of authorization; request for comments.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA), notification is hereby given that NMFS has received an application from the Port of Anchorage (herein after ''Port'') to take small numbers of marine mammals, by Level B harassment, incidental to the 5–year Phase II portion of the Marine Terminal Redevelopment Project (herein after ''Project'') at the Port, Anchorage, Alaska. Species which could be potentially taken from Port construction include the beluga whale (*Delphinapterus leucas*), harbor seal (*Phoca vitulina*), harbor porpoise (*Phocoena phocoena*), and killer whale (*Orcinus orca*). NMFS is requesting comments on its proposal to issue a 1–year incidental harassment authorization (IHA) for the 2008 construction season (April-October) and its intent to promulgate regulations in 2009 governing the take of marine mammals over a 5–year period incidental to the activities described herein.

DATES: Comments and information must be received no later than April 17, 2008.

ADDRESSES: Comments on the application should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing email comments is *PR1.0648–XG36@noaa.gov*. NMFS is not responsible for e-mail comments sent to addresses other than the one provided here. Comments sent via e-mail, including all attachments, must not exceed a 10–megabyte file size.

A copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*.

Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Jaclyn Daly or Jolie Harrison, Office of Protected Resources, NMFS, (301) 713–2289.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings may be granted for up to 5 years if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as: an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Under 50 CFR 216.104(b) of NMFS' implementing regulations for the MMPA, NMFS must publish in the **Federal Register** a notice of a proposed IHA and a notice of receipt for a request for the implementation of regulations governing the incidental taking. Information gathered during the associated comment period is considered by NMFS in developing, if appropriate, regulations governing the issuance of Letters of Authorizations (LOAs) for the proposed activity.

Summary of Request

The Project is divided into 2 phases. Phase I of the project did not involve any substantive in-water noise-producing activities, however, and on May 9, 2006, NMFS concurred with the Port that incidental take of marine mammals was not likely to occur and an IHA was not necessary if operations ceased if marine mammals were seen within 50 m of in-water fill activities. In contrast to phase I, phase II of the Port expansion project involves considerable in-water construction, including pile driving, which will introduce a sound into the marine environment and could harass marine mammals. Following several delays and design changes, on September 13, 2007, the Port re-applied for an IHA for the 2008 construction season and a 5–year rulemaking and letters of authorization (LOAs) for the subsequent 2009–2012 construction seasons. The Project is scheduled to be complete in 2012.

The Project is designed to upgrade and expand the Port by replacing aging and obsolete structures and provide additional dock and backland areas. Located on the east bank of Knik Arm in upper Cook Inlet (CI), the 129–acre Port is operating at or above sustainable practical capacity. The expansion of the Port is necessary to adequately support the economic growth of Anchorage and the state of Alaska through 2025. The Port currently serves 80 percent of Alaska's populated area, and it handles over 90 percent of consumer goods sold within the Alaskan Railroad distribution area (the Alaska Railroad runs from Seward through Anchorage, Denali, and Fairbanks to North Pole, with spurs to Whittier and Palmer (locally known as ''The Railbelt'').

Construction activities that will alter the environmental baseline include pile driving, dredging, and backfilling and compaction of fill. These activities have the potential to affect marine mammals from sounds generated from construction, alteration of habitat, and increased vessel noise due to Port expansion. Of the activities listed above, pile driving has the potential to result in harassment to marine mammals due to source levels and nature of operations, and the Port has requested authorization for takes resulting from this activity. Because pile driving has the potential to result in behavioral harassment of marine mammals located in Knik Arm, an authorization under section 101(a)(5)(A) or (D) of the MMPA is warranted.

Action Area

Cook Inlet is a semi-enclosed tidal estuary, extending roughly 370 km (200 nm.) southwest from Knik and Turnagain Arms, which almost surround the city of Anchorage, to Kamishak and Kachemak Bays. The inlet has marine connections with Shelikof Strait and the Gulf of Alaska

(GOA), and freshwater input from many large rivers (Muench *et al.*, 1978). The shoreline of Cook Inlet is irregular, comprised of a series of channels, coves, flats, and marshes. The Port is located within the Municipality of Anchorage between Ship Creek and Elemendorf Air Force Base on the eastern shore of Knik Arm. Knik Arm, is a relatively shallow, 30 mile long waterway that is 2–6 miles in width. This estuary is extremely silty and exhibits some of the strongest currents (up to 8 kts) and tidal variations (30+ft) in the world. Knik Arm contains many gyres created by predominant headlands that are important to beluga prey distribution.

Construction Process

The Project calls for an open cell sheet pile (OCSP) design. Pile driving of steel 36–inch (91.4 cm) and H-piles, along with open cell sheet piles, will occur in Phase II of the Project from April to October, annually, and is proposed to be completed in 2012. Pile driving is necessary to construct the waterfront bulkhead structure that will facilitate increased dock space and the fendering system. The bulkhead will be comprised of conjoining face and tail sheet-pile cells, forming a row of U-shaped, open cell sheet pile structures. The cells will serve to retain the fill material and provide the vertical bulkhead docking structure for berthing barges and ships. Approximately 17 face sheets and one tail wall per 27.5 linear ft (8.4 m) of dock face will be used. Each tail wall will extend up to 183 ft (55.8 m) landward from the dock face and include up to 110 tail sheets. Approximately 30 linear ft. of open cell sheet pile wall will be constructed in a 10 hour period. In 2008, it is estimated that 1,807 open cell face sheets and 8,175 tail sheets will be erected at the Port. These conjoining sheets will equate to 2,923 ft. (891 m) (face length) of open cell sheet piles weighing approximately 13,412 tons. A pile-driving hammer will be used to install sheet piles to the desired tip elevation (*i.e.*, how far the sheet pile extrudes from the substrate). Sheet piles will be driven with a vibratory hammer to the maximum extent possible (*i.e.*, until desired depth is achieved and/or to refusal, prior to using an impact hammer). Standard tip elevation for a dredge depth of -35 ft (10.7 m) and -45 ft (13.7 m) mean low low water are -50 and -60 ft (15–18 m), respectively.

Two methods of pile driving, impact and vibratory, will occur. Impact pile driving will only occur when vibratory driving is not sufficient. It is estimated that pile driving will be 40 percent vibratory and 60 percent impact for the first year of construction (2008) due to the dense clay substrate in the North Extension and Barge Berths areas. The percentage of impact pile driving will decrease in subsequent years. Work hours for pile driving are anticipated to be 6 a.m. to 10 p.m., up to seven days a week; however, proposed mitigation will restrict impact pile driving on two hours either side of low tide due to high beluga use during this time (see Mitigation section).

Backfilling and compaction of fill material will involve placing clean sand, gravel, or stone immediately behind the sheet-pile face up to an elevation of 30 ft (9.14 m). Upon completion, 135 acres of wetland would be filled, eliminating 9,000 linear ft (2.74 km) of intertidal habitat. To complete the 2008 Project tasks, approximately 1,600,000 cubic yards (cy) of suitable engineered and common fill material will be placed behind vertical steel or rock retaining features at the North Extension area which will result in the fill of as much as 18.4 acres of tideland. A vibratory probe and pile driving hammer will be used at evenly spaced locations to consolidate the fill. NMFS does not anticipate that this activity (i.e., fill compaction) will acoustically harass marine mammals due to the absorption of sound by the fill which will appreciably reduce sound energy released into the water.

Upon completion of Phase II of the Project, which will require additional take authorization such as subsequent LOAs, approximately 7,900 linear ft. (2.41 km) of dock parallel to and approximately 400 ft (122 m) west of the face of the existing dock structure, along with backfilling, will have been added to the Port. The new dock face will include 7,430 ft (2.26 km) of vertical sheet-pile wharf and 470 ft (143 m) for a dry barge berth. The completed marine terminal will include seven modern dedicated ship berths; two dedicated barge berths; rail access; modern shore-side facilities; equipment to accommodate cruise passengers; cement bulk, roll on/roll off and load on/load off cargo; containers; general cargo, military deployments, general cargo on barges, petroleum, oil, and lubricants; and additional land use area to support expanding military and commercial operations. More information on the Project design, phasing plan, and construction can be found at www.portofanchorage.org.

Marine Mammals Affected by the Project

Cook Inlet is utilized by several species of marine mammals; however, most of these are confined to the Lower Inlet and would not be affected by the Project. In Knik Arm, the CI beluga whale is the most abundant marine mammal. Harbor seals, harbor porpoise, and killer whales are also found in the Inlet but they do not display a regular presence in Knik Arm. There have been no published sightings of Steller sea lions (*Eumetopias jubatus*) in Knik Arm, only a single adult male in the Susitna Flats area; therefore, Steller sea lions are not anticipated to be affected by the Project and will not be considered further. If, by chance, a marine mammal not authorized to be taken is seen around the construction area, shut down will be required so as to avoid unlawful take.

NMFS is proposing to allow 34 beluga whale takes, 20 harbor seals takes, 20 harbor porpoise takes, and 5 killer whales takes, by Level B harassment only, incidental to the activities occurring in the 2008 construction year. Beluga take numbers for future LOAs, if issued, will be calculated upon gathering further information from monitoring and acoustic data as pile driving hours will change as well as percentage of impact and vibratory driving. Take numbers for other marine mammals are expected to remain the same throughout the construction phase of the Project. Further information on the status and distribution of Alaskan marine mammals can be found in the 2006 NMFS' Alaskan Stock Assessment Report (*http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2006.pdf*) and *http://www.fakr.noaa.gov/protectedresources*.

Beluga Whales

Status and Abundance

In the U.S. waters, beluga whales comprise five distinct stocks: Beaufort Sea, Eastern Chukchi Sea, Eastern Bering Sea, Bristol Bay, and Cook Inlet (Angliss and Outlaw, 2006). The only stock likely to be affected by the proposed construction activities at the Port is the CI stock. This population is genetically isolated from other populations by the geographic barrier of the Alaska peninsula and by their year-round residency in the Inlet (Hobbs *et al.*, 2006).

The CI beluga population has declined significantly over the years. Historical data suggest this population once numbered around 1,300 (Calkins, 1988). NMFS systematic aerial surveys documented a decline in abundance of nearly 50 percent between 1994 and 1998, from an estimate of 653 whales to 347 whales (Hobbs *et al.*, 2000). Aerial annual abundance surveys conducted each June/July from 1999 to 2005 have resulted in abundance estimates of 367,

435, 386, 313, 357, 366, and 278 whales for each year, respectively (Rugh *et al.*, 2005, NMFS unpublished data). According to NMFS 2006 stock assessment report, the population estimate for CI belugas is 278 with a minimum population estimate of 238; however, more recent surveys estimate the current population as of 2006 to be 302 belugas (Rugh *et al.*, 2006). This stock is listed as depleted under the MMPA and was proposed for listing under the ESA on April 20, 2007 (72 FR 19854).

Subsistence harvest is believed to have been the major contributor to the population decline (NMFS 2006). NMFS estimated that the average annual take for subsistence harvest, including whales that were struck and lost, was 67 whales per year from 1994 through 1998. Annual harvest estimates for 1994 thru 1998 are 21 whales (1994), 70 whales (1995), 98 whales (1996), 70 whales (1997) and 50 whales (1998). The harvest, which was as high as 20 percent of the stock in 1996, was sufficiently high to account for the 14 percent annual rate of decline in the stock during the period from 1994 through 1998 (Hobbs *et al.* 2000). The last year in which unregulated subsistence harvests occurred was 1998. In 1999 and 2000, Public Laws 106–31 and 106–553 established a moratorium on CI beluga whale harvests except for subsistence hunts by Alaska Natives and conducted under cooperative management agreements between NMFS and affected Alaska Native Organizations. This moratorium was made permanent in December 2000. In 2003 and 2004, respectively, a Final Environmental Impact Statement (EIS) (68 FR 55604, September 26, 2003) and Final Interim Regulations Governing the Taking of Cook Inlet Beluga Whale by Alaska Natives for Subsistence Purposes (69 FR 17973, April 6, 2004) were completed to address prior beluga whale harvests. In keeping with sections 101(b) and 103(d) of the MMPA, NMFS Alaska Region convened a formal administrative hearing on the proposed harvest regulations before an Administrative Law Judge and seven interested parties in December 2000, in Anchorage, Alaska. That administrative hearing process culminated in 2005 with the Administrative Law Judge's final decision recommending a long-term plan for managing the subsistence harvests of CI belugas by Alaska Natives. NMFS has since then completed a Draft Supplemental EIS (72 FR 73798, December 28, 2007) proposing long-term harvest regulations through recovery. Despite strict harvest limits since 1999, the population has not recovered. Factors inhibiting recovery include vessel traffic, small stock size, restricted summer range, habitat alteration, and natural mortality (NMFS, 2006).

Distribution

The CI beluga's range is believed to be largely confined to CI with a high occurrence of animals in the upper Inlet and Knik Arm during the spring, summer, and fall seasons. These whales demonstrate site fidelity to regular summer concentration areas (Seaman *et al.*, 1985), typically near river mouths and associated shallow, warm and low salinity waters (Moore *et al.*, 2000). In the winter, beluga whales concentrate in deeper waters in mid- Inlet down to Kalgin Island with occasional forays into the upper Inlet, even to the upper ends of Knik and Turnagain Arms.

In Knik Arm, beluga whales generally are observed arriving in May and often use the area all summer, feeding on the various salmon runs and moving with the tides. There may be more intensive use of Knik Arm in August and through the fall, coinciding with the coho run. Whales will gather in Eagle Bay and elsewhere on the east side of Knik Arm and sometimes in Goose Bay on the west side of Knik Arm. During high tides, belugas are generally concentrated around prime feeding habitats in the upper reaches of the Arm, an area unaffected by the Project. They often retreat to the lower portion of Knik Arm during low tides.

Fourteen belugas were satellite-tagged in upper CI in Knik Arm between late July and early September 2000–2002. These tags provided location and movement data through the fall and winter and into May. During summer and autumn, whales were concentrated in river and bays in Upper CI with whales traveling back and forth between Knik Arm (*e.g.*, Eagle River), Chichaloon Bay, and upper Turnagain Arm, although some whales also spent time offshore. When in these areas, whales made rapid movements between distinct bays or river mouths (moving either to the east or to the west of Fire Island, past Pt. Woronzof and the Port of Anchorage) and often remained stationary in one area for many weeks followed by a rapid movement to another area (within a day). One whale tracked in 2001 moved back and forth between the three bodies of water listed above seven times in three months. Area use in August was the most limited of all months (approximately 50–75 percent of the recorded locations in August were in Knik Arm, concentrated near Eagle River. In September they continued to use Knik Arm and increased use of the Susitna delta, Turnagain Arm and Chickaloon Bay, and also extended use along the west coast of the upper Inlet to the Beluga River. In October, beluga whales ranged widely down the Inlet in coastal areas, reaching Chinitna Bay, and Tuxedni Bay and continued to use Knik Arm, Turnagain Arm, Chickaloon Bay, and Trading Bay (MacArthur River). November use was similar to September. In December, beluga whales moved offshore with locations distributed throughout the upper to mid-Inlet and in January, February, and March, they used the central offshore waters moving as far south as Kalgin Island and slightly beyond. Belugas also ranged widely during February and March with excursions to Knik and Turnagain Arms, in spite of greater than 90 percent ice coverage. Average daily travel distance ranged from 11–30 km per day. No satellite tags were on animals from April-mid July.

Social Dynamics

Beluga whales are extremely social animals that typically migrate, hunt, and interact together. Nowak (1991) reports the average pod size as 10 animals, although beluga whales may occasionally form larger groups, often during migrations. Groups of 10 to several hundred beluga whales have often been observed during summers in CI; however solitary animals and smaller groups are not uncommon around the Port (LGL 2005, 2006, 2007). Native hunters have stated that beluga whale form family groups and suggest that there are four types of beluga whales in CI, distinguished by their size and habits (Huntington 2000); however, this has not been confirmed.

Feeding

Beluga whales are opportunistic feeders known to prey on a wide variety of animals. They eat octopus, squid, crabs, shrimp, clams, mussels, snails, sandworms, and fish such as capelin, cod, herring, smelt, flounder, sole, sculpin, lamprey, lingcod and salmon (Perez, 1990; Haley, 1986; Klinkhart, 1966). Natives also report that CI beluga whale feed on freshwater fish: trout, whitefish, northern pike, and grayling (Huntington, 2000), and on tomcod during the spring (Fay *et al.*, 1984).

Salmon and eulachon species are high quality prey that have high lipid (fat) content, up to 21 percent (Payne *et al.*, 1999). Calkins (1989) recovered 13 salmon tags from the stomach of an adult beluga whale found dead in Turnagain Arm. These salmon had been tagged in upper Susitna River. Beluga

whales in captivity may consume 2.5–3 percent of their body weight daily, or approximately 40–60 pounds (18.2- 27.3 kg). Wild beluga whale populations, faced with an irregular supply of food or with increased metabolic needs, may easily exceed these amounts while feeding on concentrations of eulachon and salmon. Beluga whale hunters in CI reported one whale having 19 adult king salmon in its stomach (Huntington 2000) and an adult male beluga whale had 12 adult coho salmon in its stomach at a weight of 27.8 kg (61.5 lbs).

Herring may be another important forage fish for beluga whales as identified by a 1993 smolt survey of the upper Inlet which found juvenile herring to be the second-most abundant fish species collected. These herring were primarily caught along the northwest shore, including the Susitna delta (Moulton, 1994).

Beluga whales capture and swallow their prey whole, using their blunt teeth only to grab. These whales often feed cooperatively. At the Port, beluga whales have been observed positioning one whale along a rip rap dock, while a second whale herds salmon along the structure toward the stationary beluga whale. The concentrations of CI beluga whales offshore of several important salmon streams in the upper Inlet is assumed to be a feeding strategy which takes advantage of the bathymetry of the area. The fish are funneled into the channels formed by the river mouths and the shallow waters act as a gauntlet for salmon as they move past waiting beluga whales. Dense concentrations of prey appear essential to beluga whale feeding behavior. Hazard (1988) hypothesized that beluga whales were more successful feeding in rivers where prey were concentrated than in bays where prey were dispersed.

Habitat

Since their rapid population decline, CI beluga distribution has also decreased (Rugh *et al.*, 2000); however, there is obvious and repeated use of certain habitats. From April through November whales concentrate at river mouths and tidal flat areas, moving in and out with the tides. The timing and location of eulachon and salmon runs affect beluga whale feeding behavior and have a strong influence on their summer movements. Beluga and prey distribution is heavily dependent upon tides in Knik Arm with approximately 70 percent of sightings at the Port from monitoring data in 2006 being around low tide. The range of tides at Anchorage is extreme at about 29 feet and the observed extreme low water is 6.4 feet below mean low low water. Tidal energy is the most dominant force driving water circulation in Knik Arm. Because of predominantly shallow depths, tides within Knik Arm have a much larger range than in the main body of Cook Inlet (KABATA, 2006). Maximum current speeds in Knik Arm, observed during spring ebb tide, exceed 7 knots (12 feet/second).

Beluga whale concentration areas correspond with prey availability. Beluga whales frequently move in and out of deeper water and between feeding, calving, and nursery areas throughout the mid and upper Inlet. Access to these areas and corridors in between these areas is important. Knik Arm, Turnagain Arm, Chickaloon River and the Susitna River delta areas are used extensively. It is possible these sites provide for other biological needs, such as calving or molting. Such habitat sites and use have been reported elsewhere in Alaska, although there is not adequate information to identify these calving and molting habitat attributes in Knik Arm.

NMFS has characterized the relative value of four habitats as part of the management and recovery strategy in its ''Draft Conservation Plan for the CI Beluga Whale (Delphinapterus leucas)'' (NMFS, 2006). These are sites where beluga whales are most consistently observed, where feeding behavior has been documented, and where dense numbers of whales occur within a relatively confined area of the Inlet. Type 1 habitat is termed ''High Value/ High Sensitivity'' and includes what NMFS believes to be the most important and sensitive areas of the Inlet for beluga whales. Type 2 is termed ''High Value,'' and includes summer feeding areas and winter habitats in waters where whales typically occur in lesser densities or in deeper waters. Type 3 habitat occurs in the offshore areas of the mid and upper Inlet and also includes wintering habitat. Type 4 habitat describes the remaining portions of the range of these whales within Cook Inlet. The habitat within the Project footprint that will be directly impacted from construction is considered Type 2 habitat while just north of the Port is classified as Type 1.

Beluga Hearing Sensitivity

Beluga whales are characterized as mid-frequency odontocetes but have an excellent range of hearing. Hearing of belugas is believed to be in the frequency range of 40 Hz–150kHz with keen hearing at 10–100kHz. Above 100 kHz their sensitivity drops off very fast (Au, 1993) and below 8 kHz the decrease in sensitivity is more gradual at approximately 11 dB per octave (Awbrey *et al.*, 1988). While their peak sensitivity range is outside of most industrial sounds, studies have shown that belugas can hear and react to such low frequency noise, dependent upon intensity (i.e., decibels). Awbrey *et al.* (1988) conducted a study on captive, trained belugas to discern low frequency threshold levels. Belugas reacted, on average, to 125 Hz, 25 Hz, and 500Hz at 121dB, 118dB, and 108 dB, respectively. Therefore, as frequency increases, sensitivity also increases.

Harbor Seals

Harbor seals are important upper-trophic marine predators that occupy a broad range in Alaska from approximately 130° W to 172° E (over 3,500 km east to west) and from 61° N to 51° N (over 1,000 km north to south). Currently, harbor seals in Alaska are divided into three stocks: Bearing Sea, Gulf of Alaska (GOA), and Southeast Alaska. While new genetic information has lead to a reassessment of this delineation, it has not yet been finalized. Harbor seals which could be affected by the Project belong to the Gulf of Alaska stock. Based on aerial GOA and Aleutian Islands surveys, in 1996 and 1999 respectively, the current abundance estimate for this stock is 45,975 (CV = 0.04) with a minimum population estimate of 44,453 (NMFS, 2006). Sources of anthropogenic caused mortality for this stock include interactions with fishing gear (mean annual mortality is approximately 24 animals), subsistence hunting (mean annual harvest equals 795), and, to a lesser degree, illegal intentional killing.

Harbor seals haul out on rocks, reefs, beaches, and drifting glacial ice, and feed in marine, estuaries, and occasionally fresh waters. They are generally non-migratory, with local movements associated with such factors as tides, weather, season, food availability, and reproduction; however, some long-distance movements have been recorded from tagged animals (mostly juveniles). The major haul-out sites for harbor seals are located in Lower CI with the closest identified harbor seal haul-out site to the Port approximately 25 miles south along Chickaloon Bay in the southern portion of Turnagain Arm. However, harbor seals have been observed around the Port. In 2004–2005, 22 harbor seal sightings were reported over a 13–month period comprising of 14,000 survey hours. From these surveys, it is estimated that harbor seals occur in a density of approximately 1.7 animals per month in Knik Arm (LGL unpubl. data).

Pinniped hearing is measured for 2 mediums, air and water. In water hearing ranges from 1–180 kHz with peak sensitivity around 32kHz. In air, hearing capabilities are greatly reduced to 1–22kHz with sensitivity at 12kHz. This range is comparable to human hearing (0.02 to 20 kHz). Harbor seals have the potential to be affected by in-air and in-water noise associated with construction activities.

Harbor Porpoise

Harbor porpoise are found within Cook Inlet but in low abundance, especially in Knik Arm. Currently, the population estimate for the Gulf of Alaska harbor porpoise stock is 41,854 with a minimum population estimate of 34,740 (NMFS 2006). Estimated density of harbor porpoise in Cook Inlet is only 7.2 per 1000 square kilometers (Dahlheim *et al.* 2000). The highest monthly count recorded in upper Cook Inlet between April and October is 18 (LGL 2006).

Harbor porpoise have a wide hearing range and the highest upper-frequency limit of all odontocetes studied. They have a hearing range of 250 Hz–180kHz with maximum sensitivity between 16–140 kHz.

Killer Whales

Killer whales in the Gulf of Alaska are divided into two ecotypes: resident and transient. Killer whales are relatively common in lower Cook Inlet (at least 100 sightings from 1975 to 2002), but in the upper Inlet, north of Kalgin Island, sightings are infrequent (11 in 25 yrs). Transient killer whales are known to feed on the Cook Inlet stock of beluga whales and all recorded predation events have occurred in the upper Inlet. Transient killer whales seen in Cook Inlet belong to the Gulf of Alaska, Aleutian Islands, and Bering Sea Transient Stock or the small AT1 Stock. Based on the 2006 NMFS stock assessment reports, the minimum population estimate for the Gulf of Alaska, Aleutian Islands, and Bering Sea transient stock of killer whales is 314 animals based on the count of individuals using photo-identification. As of 2004, the AT1 population size is eight animals, a 64–percent decrease from 22 whales in 1989.

The hearing of killer whales is well developed. They have hearing ranges of 0.05 to 100 kHz which is lower than many other odontocetes. Peak sensitivity is around 15 kHz.

Impacts to Marine Mammals

Sound is a physical phenomenon consisting of minute vibrations that travel through a medium, such as air or water. Sound levels are compared to a reference sound pressure to identify the medium. For air and water, these reference pressures are ''re 20 μPa'' and ''re 1 μPa'', respectively (unless otherwise noted, sound levels should be considered as measured in water, *i.e.*, re 1 μPa). Sound is generally characterized by several variables, including frequency and sound level. Frequency describes the sound's pitch and is measured in hertz (Hz) or kilohertz (kHz), while sound level describes the sound's loudness and is measured in decibels (dB). Sound level increases or decreases exponentially with each dB of change. For example, 10–dB yields a sound level 10 times more intense than 1 dB, while a 20 dB level equates to 100 times more intense, and a 30 dB level is 1,000 times more intense. However, it should be noted that humans perceive a 10 dB increase in sound level as only a doubling of sound loudness, and a 10 dB decrease in sound level as a halving of sound loudness. More information on sound can be found at *www.dosits.org*.

As stated, noise from pile driving is expected to harass marine mammals present in the exposure area. Marine mammals use sound for vital life functions, and introducing sound into their environment could be disrupting to those behaviors. Sound (hearing and vocalization/echolocation) serves 4 main functions for odontocetes (toothed whales and dolphins). These functions include (1) providing information about their environment; (2) communication; (3) enabling remote detection of prey; and (4) enabling detection of predators. Sounds and non-acoustic stimuli will be generated and emitted into the aquatic environment by vehicle traffic, vessel operations, roadbed construction, and vibratory and impact pile driving. The distances to which these sounds are audible depend on source levels, ambient noise levels, and sensitivity of the receptor (Richardson *et al.* 1995). As stated, pile driving will affect marine mammals at a level which could cause behavioral harassment. Mitigation measures (see Mitigation section) are expected to prevent injurious exposure.

In an acoustic study conducted at the Port in October 2007, hydrophones were used to measure sound propagation during both impact and vibratory pile-driving. For impact pile-driving, the most conservative measurement showed that at 19m the received level was 177 dB re 1 μPa (root mean square (rms) ranging from 100–15,000 Hz. For vibratory pile-driving, the most conservative measurement showed that at 20m the received level was 162 dB ranging from 400–2,500 Hz. These measurements were used to estimate the distances at which animals might be exposed to received levels that could lead to injury or behavioral harassment. Impact pile driving requires much more energy (*i.e.*, louder) than vibratory pile-driving due to the nature of the operations. However, low frequency sound travels poorly in shallow water, so transmission of these sounds in Knik Arm is expected to be confined to relatively short ranges.

Sounds generated from pile driving, dredging, and other construction activities will be detectable underwater and/or in air some distance away from the area of activity. Audible distance, or received levels (RLs) will depend on the nature of the sound source, ambient noise conditions, and the sensitivity of the receptor to the sound (Richardson *et al.*, 1995). Type and significance of marine mammal behavioral reactions are likely to be dependent upon, among other parameters, the behavioral state (e.g., feeding, traveling, etc.) of the animal at the time it receives the stimulus, as well as the distance from the sound source and the level of the sound relative to ambient conditions (Southall *et al.*, 2007).

Hearing Impairment and Other Physical Effects

Temporary or permanent hearing impairment is a possibility when marine mammals are exposed to very loud sounds, but no studies have been conducted that examine impacts to marine mammal from pile driving noise. Current NMFS practice regarding exposure of marine mammals to high-level sounds is that cetaceans and pinnipeds exposed to impulsive sounds of 180 and 190 dB rms or above, respectively, are considered to have been taken by Level A (*i.e.*, injurious) harassment. Behavioral harassment (Level B) is considered to have occurred when marine mammals are exposed to sounds at or above 160dB rms for impulse sounds (*e.g.*, impact pile driving) and 120dB rms for continuous noise (*e.g.*, vibratory pile driving), but below injurious thresholds. These levels are considered precautionary.

Several aspects of the planned monitoring and mitigation measures for this project are designed to detect marine mammals occurring near pile driving, and to avoid exposing them to sound that could potentially cause hearing impairment (*e.g.*, mandatory shut down zones). In addition, marine mammals will be given a chance to leave the area during ''soft start'' and ''ramp-up'' procedures to avoid exposure to full energy pile driving. In those cases, the avoidance responses of the animals themselves will reduce or

eliminate any possibility of hearing impairment. Hearing impairment is measured in two forms: temporary threshold shift and permanent threshold shift.

Temporary Threshold Shift (TTS)

TTS is the mildest form of hearing impairment that can occur during exposure to a loud sound (Kryter, 1985). Southall *et al.* (2007) considers a 6 dB TTS (*i.e.*, baseline thresholds are elevated by 6 dB) sufficient to be recognized as an unequivocal deviation and thus a sufficient definition of TTS-onset. Auditory fatigue (*i.e.*, TTS) in mid-frequency cetaceans has been measured after exposure to tones, impulsive sounds, and octave-band noise. Because it is non-injurious, NMFS considers TTS as Level B harassment that is mediated by physiological effects on the auditory system; however, NMFS does not consider onset TTS to be the lowest level at which Level B Harassment may occur.

While experiencing TTS, the hearing threshold rises and a sound must be louder in order to be heard. TTS can last from minutes or hours to (in cases of strong TTS) days. For sound exposures at or somewhat above the TTS-onset threshold, hearing sensitivity recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals. For toothed whales exposed to single short pulses, the TTS threshold appears to be, to a first approximation, a function of the energy content of the pulse (Finneran *et al.*, 2002).

Laboratory experiments investigating TTS onset for belugas have been conducted for both pulse and non-pulse sounds. Finneran *et al.* (2000) exposed a trained captive beluga whale to a single pulse from an explosion simulator. No TTS threshold shifts were observed at the highest received exposure levels (179dB re 1 µPa2–s [SEL]; approximately 199 dB rms). It should be noted in this study that amplitudes at frequencies below 1 kHz were not produced accurately to represent predictions for the explosions. Another study was done using seismic waterguns with a single acoustic pulse (Finneran *et al.* 2002). Measured TTS was 7 and 6 dB in the beluga at 0.4 and 30 kHz, respectively, after exposure to intense single pulses (186 dB SEL; ~ 208 dB rms). Schlud*t et al.*, 2000 demonstrated temporary shifts in masked hearing thresholds for belugas occurring generally between 192 and 201 dB rms (192–201 dB SEL) after exposure to intense, non-pulse, 1–s tones at , 3, 10, and 20 kHz. TTS onset occurred at mean sound exposure level of 195 dB rms (195 dB SEL). To date, no studies relating TTS onset to pile driving sounds have been conducted for any cetacean species.

Permanent Threshold Shift (PTS)

When permanent threshold shift (PTS) occurs, there is physical damage to the sound receptors in the ear. In some cases, there can be total or partial deafness, whereas in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges. PTS consists of non-recoverable physical damage to the sound receptors in the ear and is therefore classified as Level A harassment under the MMPA. Level A harassment of marine mammals is not expected due to proposed mitigation measures and source levels, nor will it be authorized under this IHA.

There is no empirical data for onset of PTS in any marine mammal, and therefore, PTS- onset must be estimated from TTS-onset measurements and from the rate of TTS growth with increasing exposure levels above the level eliciting TTS-onset. PTS is presumed to be likely if the threshold is reduced by ≥ 40 dB (*i.e.*, 40 dB of TTS).

Relationships between TTS and PTS thresholds have not been studied in marine mammals, but are assumed to be similar to those in humans and other terrestrial mammals. PTS might occur at a received sound level 20 dB or more above that of inducing mild TTS if the animal were exposed to the strong sound for an extended period, or to a strong sound with rather rapid rise time. Due to proposed mitigation measures and source levels for the Project, NMFS does not expect that marine mammals will be exposed to levels that could elicit PTS.

Non-auditory Physiological Effects

Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage. Due to proposed mitigation measures (e.g., mandatory shut downs) marine mammals would not be exposed to sound at or above 180dB; therefore, it is not expected that severe physiological effects from exposure to sound would be expected; however, a hormonal stress response is possible. Romano *et al.* (2004) demonstrated that belugas exposed to seismic water gun and (or) single pure tones (up to 201 dB rms) resembling sonar pings showed increased stress hormone levels of norepinephrine, epinephrine, and dopamine. While RLs would not be as strong as the ones in that study, a stress response would not be unexpected. Studies have also demonstrated that reactions of animals to sounds could result in physical injury. For example, it has recently been reported that stranded deep diving marine mammals displayed physical attributes similar to the bends (*e.g.*, in vivo gas bubble formation) (Ferndandez *et al.*, 2005, 2006). Marine mammals may experience these symptoms if surfacing rapidly from deep dives in response to loud sounds. Because Knik Arm is a shallow water estuary, marine mammals found there are not considered deep divers, and due to proposed mitigation measures, non-auditory physiological impacts, other than stress, are not expected.

Impacts to Beluga Whales

The marine mammal species or stock that could be most affected from the Project is the beluga whale. Observation and tagging data both indicate that the northernmost parts of upper Cook Inlet, including Knik Arm, are the focus of the stock's distribution in both summer (Rugh *et al.*, 2000) and winter (Hobbs *et al.*, 2005). Because of the very restricted range of this stock, CI belugas can be assumed to be sensitive to human-induced or natural perturbations. Contaminants from a variety of sources, sound, onshore or offshore development, and construction have the potential to impact this stock or its habitat.

There are no consistent observed threshold levels at which belugas, and marine mammals in general, respond to an introduced sound. Beluga responses to sound stimuli have been noted to be highly dependent upon behavioral state and motivation to remain or leave an area. Few field studies involving industrial sounds have been conducted on beluga whales. Reactions of belugas in those studies varied. For example, in Awbrey and Stewart (1983) (as summarized in Southall *et al.*, 2007), recordings of noise from SEDCO 708 drilling platform (non-pulse) were projected underwater at a source level of 163 dB rms. Beluga whales less than 1.5 km from the source usually reacted to onset of the noise by swimming away (RLs approximately 115.4 dB rms). In two instances groups of whales that were at least 3.5 km from the noise source when playback started continued to approach (RLs approximately 109.8 dB rms). One group approached within 300 m (RLs approximately 125.8 dB rms) before all or part turned back. The other group submerged and passed within 15m of the projector (RL

approximately 145.3 dB). Richardson *et al.* (1990), as summarized in Southall *et al.*, 2007, played back drilling platform sounds (source level: 163 dB) while approximately 100 belugas were in the area of several hundred to meters to several hundred kilometers. No obvious reactions were noted; however, moderate changes in behavior for three groups swimming within 200m of the sound projector were observed. In other studies, belugas exposed to seismic airguns (multiple pulse) at RLs of 100 to 120 dB rms were determined to have had no observable reaction; however, RLs between 120 and 150 dB rms were determined to have induced temporary avoidance behavior, based on vessel-based and aerial observations (Miller *et al.*, 2005).

TTS experiments have also documented behavioral responses by trained belugas. These responses included reluctance to return to experimental stations when exposed to watergun pulse sounds at approximately 185.3 dB rms (171dB SEL) (Finneran *et al.*, 2002) and behavioral changes when exposed to sounds from the explosion simulator at approximately 200 dB rms (177 dB SEL) (Finneran *et al.*, 2000). In a non-pulse exposure experiment (*i.e.*, 1 s tones), belugas displayed altered behavior when exposed to 180 196 dB rms (180–196 dB SEL) (Schlundt *et al.*, 2000).

While no studies have been conducted for belugas in response to pile driving, bottlenose dolphin and humpback dolphin behavior has been observed in relation to this activity. These species are also considered mid frequency odontocetes and have hearing capabilities similar to that of beluga whales. McIwen (2006) observed a temporary displacement of bottlenose dolphins during pile driving activities, although it could not be determined if this was a result of the pile driving noise itself or displacement of prey. Mhenni (1993) reported bottlenose dolphins appeared to be repelled by noise pulses obtained by striking an iron pipe held in the water. Furthermore, Wursig *et al.* (2000) reported Indo-Pacific humpback dolphins increased speeds of travel during pile driving and were found in lower abundance immediately after pile driving; however, no overt changes in behavior were observed.

Masking of whale calls or other sounds potentially relevant to whale vital functions may occur. Masking occurs when the background noise is elevated to a level which reduces an animal's ability to detect relevant sounds. The impacts of masking are expected to be limited by the intermittent nature of the impact pile driver noise, the whales' directional hearing, and their ability to adjust vocalization amplitude, frequency, and the structured content of their signals (McIwem, 2006). Belugas have been known to increase their levels of vocalization as a function of background noise by increasing call repetition and shifting to higher frequencies (Lesage *et al.*, 1999; Scheifele *et al.*, 2005). Another adaptive method to combat masking was demonstrated in a beluga whale which reflected its sonar signal off the water surface to ensonify to an object on which it was trained to echolocate (Au *et al.*, 1987). Due to the low frequencies of construction noise and the ability of belugas to adapt vocally to increased background noise, it is anticipated that masking, and therefore interruption of behaviors such as feeding and communication, will be minimized.

Many marine mammals, including beluga whales, perform vital functions (e.g., feeding, resting, traveling, socializing) on a diel (i.e., 24 hr) cycle. Repeated or sustained disruption of these functions is more likely to have a demonstrable impact than a single exposure (Southall *et al.*, 2007). However, it is possible that marine mammals exposed to repetitious construction sounds from the proposed construction activities will become habituated and tolerant after initial exposure to these sounds, as demonstrated by beluga vessel tolerance (Richardson *et al.*, 1995, Blackwell and Green, 2002). Habituation is found to be common in marine mammals faced with introduced sounds into their environment. For example, bowhead whales (Balaena mysticetus) have continued to use pathways where drilling ships are working (RLs: 131 dB) so that they can continue their eastward migration (Richardson *et al.*, 1991). In addition, harbor porpoise, dolphins, and seals have become habituated to acoustic harassment deterrent devices such as pingers and ''seal bombs'' after repeated exposure (Mate and Harvey, 1987; Cox *et al.*, 2001).

Although the Port is a highly industrialized area supporting a large amount of ship trafic, belugas are present almost year round. It is anticipated that belugas will become increasingly habituated to the Project sounds. CI belugas have demonstrated a tolerance to ship traffic around the Port, as documented in numerous surveys conducted by LGL in this area. Animals will be exposed to greater than background noise levels from pile driving; however background sound levels in Knik Arm are already higher than most other marine and estuarine systems due to strong currents and eddies, recreational vessel traffic, and commercial shipping traffic entering and leaving the Port. During the acoustic study for this Project, carried out by URS, ambient sound levels (in absence of any vessels) were recorded between 105 and 120dB. A tug pushing a barge raised those measurements to about 135dB when it was 200m from the recording vessel. Based on the already elevated background noise around the Port and beluga's ability to compensate for masking, it can be reasonably expected that belugas will become habituated to the daily pile driving, as they have for vessel traffic. It is expected that frequency and intensity of behavioral reactions will decrease when habituation occurs.

Lack of behavioral reaction indicating habituation does not necessarily mean that the animals are not being harassed or injured. For example, in Newfoundland, seafloor blasting occurred in an area utilized by foraging humpback whales (Megaptera novaeangliae), yet the whales did not show any behavioral reaction to the blasting in terms of movement or residency times. Despite a lack of behavioral reaction, two humpbacks entangled in fishing gear were found in that area to have had experienced significant blast trauma to the temporal bones, although the seafloor blasting could not be determined to be causal (Ketten *et al.*, 1993). However, pile driving activities do not release the same type of, or as much energy as seafloor blasting and, due to proposed mitigation measures, marine mammals will not be exposed to such intense sounds at the Port. Therefore, injury or other physical effects will not likely occur.

NMFS believes responses of beluga whales to pile driving activities would be behavioral in nature and could likely include altered headings, fast swimming, changes in dive, surfacing, respiration, and feeding patterns, and changes in vocalizations. However, NMFS anticipates that belugas would not alter their behavior in a way that prevents them from entering and/or transiting throughout Knik Arm. Belugas are currently known to associate with vessels emitting loud low frequency sounds around the Port. Belugas, and other marine mammals, may undergo a hormonal stress response when exposed to pile driving sounds; however, NMFS believes this stress response would be short term and not lead to any long-term effects Furthermore, NMFS does not anticipate that more serious effects (*e.g.*, neurological effects, organ/tissue

damage) would occur. Due to proposed mitigation measures, marine mammals would not be exposed to high energy sounds, thereby minimizing physiological impairments. There is no evidence of injuries occurring in marine mammals exposed to sound from pile driving and there have been no direct studies of the potential for pile driving to elicit any of those effects.

Impacts to Other Marine Mammals

Harbor seals, harbor porpoise, and killer whales could also potentially be impacted from the Project. Hauled out harbor seals may flush into the water from in-air noise, disturbing their resting and warming behaviors. Killer whales and harbor porpoise may be harassed by construction noise if they are in the area of the Port. Behavioral reactions by these species may be similar to belugas whales (*e.g.*, change in direction, vocalizations, etc.). For example, while construction will emit low frequency sounds outside of harbor porpoise peak sensitivity rage, these animals have elicited behavioral responses to simulated wind turbine noise, also outside peak sensitivity range (max. Energy between 30–800 Hz; spectral density source levels of 128dB at 80 and 160Hz) (Koschinski *et al.*, 2003). During this study, animals were sighted at greater ranges during playbacks of simulated wind turbine noise and observed animals more frequently used echolocation signals.

It is likely that marine mammals will be temporarily displaced or disturbed by construction activities during the terminal expansion project. Takes will be by Level B harassment (behavioral disturbance) as defined in the 1994 amendments to the MMPA. No take by serious injury or death is likely, given the planned monitoring and mitigation procedures described in the application and summarized in this document.

Estimated Take

Monitoring of beluga presence, behavior, and group composition specifically for the Project began in 2005 and continued through 2007. Theodolite tracking and grid cell mapping were used to determine the number of belugas present within the Project footprint and within a 1 x 6 km^2 area around the Port (*i.e.*, nearshore). Belugas were sighted during all months the Project will be conducting activities (April-October) but most frequently around low tide and the months of August and September, coinciding with salmon runs. These data augment those of the Hobbs *et al.* (2005) satellite tag study.

During the 2006 monitoring year, 79 percent of all beluga groups sighted were within the project footprint, despite the average 4–km detection range. The high sighting rate of belugas within or near the Port is most likely attributed to eddy formation during the ebb tide which concentrates prey in this area. Beluga monitoring also occurred in 2004/05 for the Knik Arm Bridge Toll Authority bridge project. These data were considered when calculating take numbers; however, density of whales was less than that of nearshore areas as monitored specifically for the Port. Therefore, to be conservative, the applicant, in collaboration with NMFS, used the more conservative higher nearshore density to calculate take numbers.

Based on 2005–2007 LGL monitoring data, it is calculated that, without tidally influenced mitigation, up to 21 takes of beluga whales by Level B behavioral harassment may occur (either 21 individuals harassed one time each or a lower number of individuals harassed a couple or few times each, but totaling 21) due to Port expansion for the 2008 construction year (April-October) (Table 1). These take numbers are based on the impact and vibratory pile driving isopleths of 350m (1148ft,) and 800m (2625ft.), respectively. Monthly counts of whales per hour of effort were calculated in the nearshore area (1 x 6 km2) and then divided by the area to equal a probable density of animals in any given 1 km2 per hour (rounded up). This number was then multiplied by the hours of each type of pile driving per month. Total take for the month was calculated by multiplying this number by the estimated area ensonified (around each pile-driver type) at or above the level NMFS believes will result in harassment. Because an average of 70 percent of beluga occurrences in the project footprint are estimated to occur within 2 hours of either side of low tide, takes are actually estimated to be lower due to the proposed requirement to prohibit impact pile-drivers within 2 hours on either side of low tide. However, to allow for the social dynamics of beluga whales (*e.g.*, large group sizes), NMFS is proposing to authorize 34 beluga whale takes per year. This number is considered small when compared to the current population estimate of 302 individuals.

TABLE 1.—CALCULATED EXPECTED TAKE, BASED ON NEARSHORE DENSITY, OF BELUGA WHALES FROM PILE DRIVING ACTIVITIES AT THE PORT OF ANCHORAGE IN 2008

Port of Anchorage Take Table- 2008							
Month	Impact Hours	Vibratory Hours	Avg. Whales/hr/km^2 nearshore*	Area within 160dB Impact (350m)	Expected Take (impact)	Area within 120dB Vibratory (800m)	Expected Take (vibratory)
April	86	58	0.014	0.192	0.230	1.0048	0.809
May	60	39	0.006	0.192	0.064	1.0048	0.218
June	60	39	0.011	0.192	0.125	1.0048	0.423
July	86	58	0.004	0.192	0.066	1.0048	0.231
August	86	58	0.062	0.192	1.031	1.0048	3.633
September	86	58	0.043	0.192	0.718	1.0048	2.529
October	86	58	0.020	0.192	0.335	1.0048	1.179
Total*	550	368			8		13

*The total number of authorized take is calculated by rounding up each take per month (*e.g.*, a take of 0.230 animals in April is equal to 1 take).

Based on the sighting rates of other marine mammals around the Port, other marine mammals would not be expected to be harassed from Project activities mathematically. However, because these species have been sighted in the area, NMFS is proposing to authorize a small number, relevant to the population size, of takes for harbor seals (20), harbor porpoise (20), and killer whales (5).

Effects to Marine Mammal Habitat

Beluga whales primarily use the area around the Port for traveling and foraging (LGL 2005, 2006, 2007; Port Monitoring Data, unpubl.). The primary

aquatic habitat resource losses associated with the Project are the losses and degradation of intertidal and nearshore habitat, including essential fish habitat (EFH). Noise from pile driving would result in habitat degradation; however, based on the identified behavioral harassment isopleth distances, impact and vibratory pile driving sounds above marine mammal behavioral harassment levels are expected to propagate out to only 350m and 800m, respectively. Due to the already noisy characteristics of this habitat (*e.g.*, currents, ships and recreational vessel presence), it is not expected that marine mammals, especially belugas, would be as greatly affected as if the ambient and background sound level was lower. It can be reasonably expected that marine mammals will continue to travel past the Port even when pile driving activities are occurring. However, it is possible they would do so further out towards the middle or west side of Knik Arm.

Belugas whales' diet is primarily comprised of fish, specifically salmon. Fish habitats, including EFH, in upper Cook Inlet have not been studied comprehensively, but the studies completed to date indicate that the area immediately around the Port supports a wide diversity of marine and anadromous fish species, in particular providing migrating, rearing, and foraging habitat. The intertidal and nearshore subtidal waters of the Project area are used by juvenile and adult salmonids for refuge from the strong currents of Knik Arm, as a migration corridor for adult salmonids, and as rearing and migratory habitat for several streams that drain into Knik Arm, in upper Cook Inlet. Therefore, the elimination of this habitat and alteration of hydrology would adversely impact fish, especially juveniles and smolt taking refuge in the area to be filled; however, based on the following reasons, these changes are not likely to appreciably reduce prey availability to marine mammals, particularly belugas.

The project area is located approximately 2000 feet (609.4 m) north of the mouth of Ship Creek, a stocked creek, and the proposed action would remove most of the remaining intertidal and shallow subtidal waters north of the mouth to Cairn Point. If a decrease in fish abundance occurs, this could result in decreased foraging opportunities for belugas and increased beluga energy expenditure to find prey. However, juvenile chinook salmon sampled between Cairn Point and Point Woronzof were primarily of Ship Creek hatchery origin. Juvenile salmonids are reared at the hatchery for two years prior to release at the smolt stage. Smolts released from the hatchery are ready for out migration and it is believed that the smolts reside in the Ship Creek area for a limited period before migrating elsewhere in the Knik Arm and/or Cook Inlet estuaries. Because this creek is stocked, fish would be replenished from the hatchery. Furthermore, the area directly surrounding the Port is not considered primary feeding habitat, unlike the upper reaches of Knik Arm.

Design of the sheet pile wall may provide some refuge for fish which could enhance survival. The face of each sheet-pile cell is curved outward, creating a scalloped surface. Fender pile and fender-system structural components would protrude from the face of the sheet pile approximately eight feet, which would provide some limited fish refuge. In addition, the Port is evaluating various methods for constructing joint systems between OCSP cells that would provide open water areas along the face of the dock by leaving a space between the construction joints in the sheet pile wall. These breaks in the sheet pile wall profile would create alcoves with armor rock slopes of varying sizes and shapes that would provide refuge opportunities for salmonids.

To offset direct habitat loss and degradation, the Port is required to carry out certain mitigation procedures as condition in the Army Corps of Engineers' Permit No. POA–2003–502–N. For all construction seasons, including 2008, these include, but are not limited to: (1) no in water fill placement or pile driving activities shall occur within a one week period following smolt releases from the Ship Creek hatchery; (2) fill material shall consist of clean fill, free of unsuitable material (e.g., trash, debris, asphalt, etc.), and free of toxic pollutants; and (3) the Municipality of Anchorage, in collaboration with the Corps, would execute compensatory mitigation projects that will contribute toward offsetting the functional losses attributed to the Project. These projects would support salmon populations through restoration, enhancement, creation and/or preservation (listed in order of priority) of existing nearby estuarine and associated lower riparian habitats.

NMFS has determined that fish and fish habitat, including EFH, would be adversely affected both short and long-term from the current Project design plan. Short term impacts are habitat destruction and damage to fish primarily related to filling intertidal and subtidal areas, as well as noise from pile driving. Long term impacts include permanent habitat alteration and destruction and the resulting negative impacts on fish. The degree of impact to fish populations is difficult to quantify; however, the Project will most likely decrease survival of juvenile fish emanating from Ship Creek, reducing the number of adult salmon returning to Ship Creek. However, as stated, this is a stocked creek and will be replenished. Therefore, beluga prey abundance is not expected to be significantly affected. In addition, NMFS has determined that habitat degradation from pile driving will result in only short term behavioral affects to marine mammals and not prevent belugas from transiting through the area.

Effects to Subsistence Hunting

Subsistence hunting and fishing are economically and culturally important for many Alaskan families and communities. Marine mammals taken by subsistent hunts include pinnipeds, cetaceans, and polar bears. In Cook Inlet, Alaskan natives have traditionally relied on the CI beluga whale for subsistence purposes. For several decades prior to the 1980s, the Native Village of Tyonek residents were the primary hunters harvesting Cook Inlet beluga whales; however, other tribes have since been active in the hunt. In Knik Arm, Tyonek natives remain primary subsistence users in the Knik Arm and may harvest beluga whales that pass through the Project footprint; however, no hunting will take place in or near the Project area. As stated, subsistence hunting as been greatly reduced to 1–2 whales per year. No belugas are expected to be injured or killed as a result of the Project, nor is distribution expected to be altered dramatically in Knik Arm. The disturbance and potential displacement of beluga whales by noise from 2008 construction activities are the principal concerns related to subsistence use. However, since all anticipated takes from implementation of the Project would be takes by harassment involving temporary changes in behavior, construction activities associated with the Project would not have an unmitigable adverse impact the availability of a marine mammal species or stock for taking for subsistence uses.

Proposed Mitigation

The Port, in working with NMFS, proposes the following mitigation measures for the entire Project construction (2008–2012). These measures are designed to eliminate potential for injury and reduce

harassment levels to beluga whales. Sound deterrent/minimization techniques such as bubble curtains were considered for mitigation; however, due to the strong current in Knik Arm (up to 11.2ft (3.4 m)/sec) these techniques would be inefficient. The Port continues to work with contractors to develop sound attenuation minimization techniques.

(1) Scheduling of construction activities during low use period of belugas around the Port

Tides have been shown to be an important physical characteristic in determining beluga movement within Knik Arm. During the 2004 and 2005 monitoring years, beluga sightings varied significantly with tide height at two stations near the Port (West Crossing and Cairn Point). Whales were sighted most frequently (approximately 70%) during the period around low tide at these stations and as the tide flooded, belugas typically moved into the upper reaches of the Arm. Opportunistic sightings also support the highest beluga use near the point around low tide.

Due to tidally influence habitat use around the Port, in-water impact pile driving will not occur during the 2 hours on either side of low tide (i.e., from two hours before low tide until two hours after low tide). Belugas are expected to be foraging well north of the Port during the flood and high tide. However, these northern areas are exposed during the ebb and low tide; therefore, animals move south toward Eagle Bay and the Knik Arm entrance to avoid being stranded and to feed on fish flowing out of creeks and rivers. Restricting impact pile driving during this time will reduce the number of beluga whales exposed to sounds where Level B harassment could result.

(2) Establishment of safety zones and shut down requirements

In October, 2007, the Port contracted an outside company to determine reliable estimates of distances for 190 (pinniped injury threshold), 180 (cetacean injury threshold), 160 (impact pile driving behavioral harassment threshold) and 120 dB (vibratory pile driving behavioral harassment threshold) isopleths from impact and vibratory pile driving. From this study, it has been preliminarily determined that these isopleths are 10, 20, 350, and 800 m, respectively. All threshold isopleths will also be verified with future sound index profiling studies and adjusted if necessary. Although the 190 and 180dB isopleths are within 20m for both types of pile driving, NMFS is proposing a conservative 200m mandatory shut down safety zone which would require the Port to shut down anytime a marine mammal enters this isopleth. Furthermore, to reduce chance of the Port reaching or exceeding authorized take, if a group of 5 or more belugas are sighted within the Level B harassment isopleths, shut down is required. If maximum authorized take is reached or exceeded for the year, any beluga entering into the harassment isopleths will trigger mandatory shut down.

(3) Soft start to pile driving activities

A ''soft start'' technique will be used at the beginning of each pile installation to allow any marine mammal that may be in the immediate area to leave before impact piling reaches full energy. The soft start requires contractors to initiate noise from vibratory hammers for 15 seconds at reduced energy followed by 1–minute waiting period. The procedure will be repeated two additional times. If an impact hammer is used, contractors will be required to provide an initial set of three strikes from the impact hammer at 40 percent energy, followed by a one minute waiting period, then two subsequent 3 strike sets (NMFS, 2003). If any marine mammal is sighted within the safety zone (200m) prior to pile-driving, or during the soft start, the contractor (or other authorized individual) will delay pile-driving until the animal has moved outside the safety zone. Furthermore, if marine mammals are sighted within a harassment zone prior to pile driving, operations will be delayed until the animals move outside the zones in order to avoid take exceedence. Piling will resume only after the marine mammal is determined to have moved outside the safety or harassment zone by a qualified observer or after 15 minutes have elapsed since the last sighting of the marine mammal within the safety zone.

(4) For other in-water heavy machinery operations other than pile driving (e.g., dredging), operations will cease if a marine mammal comes within 50 m, to eliminate potential for injury from a working vessel.

Marine Mammal Monitoring

Monitoring for marine mammals will take place concurrent with all pile driving activities. Two contractual observers will be placed at two localities at the Port and will implement shut down/delay procedures when applicable. These observers will be construction contractors but will have no other construction related tasks while conducting monitoring. Each observer will be properly trained in marine mammal species detection, identification and distance estimation, will be equipped with binoculars, and will be located at elevated platforms to increase sightability range. Reports will include all beluga sightings (e.g., group size, location, behavior, time of day, etc) and note if shut down/delay occurred.

Prior to the start of seasonal pile driving activities, the Port will require construction supervisors and crews, the marine mammal monitoring team, the acoustical monitoring team, and all project managers to attend a briefing on responsibilities of each party, defining chains of command, discussing communication procedures, providing overview of monitoring purposes, and reviewing operational procedures regarding belugas.

In addition to Port monitoring, but not required by NMFS, an independent beluga monitoring team from Alaska Pacific University or LGL will be surveying for marine mammals at locations outside of the Port, most likely around Cairn Point. These observers will be monitor for belugas 8 hours per day/ 4 days per week. This study is independent of the Project but will work in collaboration with the Port to communicate any presence of belugas or other marine mammals in the area during pile driving.

Acoustic Monitoring

As mandated by the Army Corps of Engineers permit, a beluga monitoring team will report on the frequency at which beluga whales are present in the project footprint, characterize habitat use and behavior near the Port correlated with construction activities, sound levels and distance attenuation related to Port background noise and expansion activities, and characterize and assess the impacts of received noise on beluga behavior and movements. This will be accomplished from land based and/or vessel based, and passive acoustic monitoring. The Port will install hydrophones (or employ other effective methodologies) necessary to detect and localize passing whales and to determine the proportion of belugas missed from visual surveys. The Port will measure and evaluate construction and operationally generated noise introduced in Knik Arm from the Project. They will also develop a ''Sound Index'' to accurately represent noise levels associated with Port operations and construction activities, which must specifically include noise levels generated from pile driving, dockside activities, vessel traffic in the channel, dredging, and docking activities. The evaluation will characterize current baseline

operational noise levels at the Port and develop an engineering report that identifies structural and operational noise reduction measures, if necessary, to minimize the baseline operational noise levels at the expanded port to the maximum extent practicable. The Port Sound Index will be combined with the beluga whale monitoring program to correlate construction and operationally generated noise exposures with beluga whale presence, absence, and any altered behavior observed during construction and operations (*i.e.*, a dose-response analysis). NMFS is considering requiring reports monthly the first year of construction (*i.e.*, the IHA period) to more closely examine behavioral reactions. An annual review of beluga observations and noise exposure data will also be provided to NMFS no later than 1 Feb. The annual review will also identify relevant technological advances in sound attenuation. The Port will employ practicable noise minimization measures identified in the annual reports for subsequent Port construction activities.

Reporting for 2008

For the 2008 IHA term, monthly reports will be required from the Port regarding mitigation implementation, acoustic propagation measurements, and beluga monitoring. The acoustic and beluga monitoring plans are available at *www.nmfs.noaa.gov/pr*. These plans may be refined by NMFS prior to issuance of the IHA. A final report will be submitted to NMFS no later than 90 days after construction activities cease for the season.

Endangered Species Act

A Section 7 consultation under the ESA is not required as no endangered or threatened species are expected to be within the Project area and therefore will not be affected by the proposed action. However, Cook Inlet beluga whales are a proposed species for listing under the ESA (72 FR 19854, April 20, 2007). A final decision on this listing is pending. The ESA provides some protection for species which are proposed, but not yet listed, to be threatened or endangered. Section 7(a)(4) requires an action agency to ''confer'' with NMFS when its actions are likely to jeopardize the continued existence of a species proposed for listing. Conference may result in the preparation of a conference report and opinion. The Port and the Corps have determined that the Project is not likely to jeopardize the Cook Inlet beluga, and that conference with NMFS pursuant to the ESA, was not necessary. NMFS concurs with this decision and has not recommend conference on this action.

National Environmental Policy Act

The Port and the Maritime Administration prepared an Environmental Assessment (EA) in 2004, which analyzed the anticipated social, economic, and environmental effects of the Project. In 2007, the Corps prepared a similar document for its issuance of Permit POA–2003–502–N which authorizes the Port expansion project. However, NMFS has determined that additional NEPA analysis is necessary to adequately determine whether significant environmental impacts could result from issuance of the proposed IHA; therefore an EA will be prepared. The EA will be available on the NMFS website upon completion.

Preliminary Determinations

NMFS has preliminarily determined that the total taking by the proposed activity will have a negligible impact on the affected species and stocks of marine mammals and will not have an unmitigable adverse impact on availability of those species or stocks of marine mammals intended for subsistence uses. Proposed mitigation, monitoring, and reporting will ensure that Project related activities will result in the least practicable adverse impact on the affected species of marine mammals and their habitat. Furthermore, there will be no adverse impact on the availability of marine mammals for subsistence uses. The taking of marine mammals associated with Port construction is unlikely to cause injury (Level A harassment) or mortality due to proposed mitigation measures that will be in place such as the use of marine mammal observers, mandatory shut down zones, and tidally restricted pile driving. Takes are expected to be limited to Level B harassment. Expected reactions include behavioral changes such as decreased use of the action area, fleeing the area if present before construction activities begin, and altered diving, foraging, movement and vocalization patterns.

Request for Comments

NMFS requests comments on its proposal to issue a one-year IHA to allow the taking of marine mammals, specifically beluga whales, incidental to Project related pile driving activities for the 2008 construction season (April-October). NMFS also requests, in accordance with 50 CFR part 216 subpart I, interested persons to submit comments, suggestions, information, and suggestions concerning the request and the possible structure and content of the regulations to govern the taking for a 5–year period of Project operations. NMFS specifically solicits comments addressing (but not limited to) the following topics: details regarding the habitat use of belugas near the Port; additional or alternative proposed mitigation measures; information addressing the potential effect of repeated exposure to loud noises or other stressful stimuli on both population health and mother/calf interactions; information regarding cetacean habituation to acoustic stimuli, and information on potential habitat impacts as it relates to marine mammals. Prior to submitting comments, NMFS recommends reviewing the Port's application as that document contains information necessary to respond appropriately to this action. If NMFS proposes regulations to allow this take, the public will also be provided with a comment period within which to submit comments on the proposed rule.

Dated: March 12, 2008.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG03

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Rocket Launches at Vandenberg Air Force Base, CA

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice of issuance of a Letter of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, and implementing regulations, notification is hereby given that an 11-month letter of authorization (LOA) has been issued to the 30th Space Wing, U.S. Air Force, to take four species of seals and sea lions incidental to rocket and missile launches on Vandenberg Air Force Base (VAFB), California.

DATES: Effective March 17, 2008, through February 6, 2009.

ADDRESSES: The LOA and supporting documentation are available for review

by writing to P. Michael Payne, Chief, Permits, Conservation, and Education Division, Office of Protected Resources, National Marine Fisheries Service (NMFS), 1315 East-West Highway, Silver Spring, MD 20910–3225 or by telephoning one of the contacts listed below (**FOR FURTHER INFORMATION CONTACT**). Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address and at the Southwest Regional Office, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802.

FOR FURTHER INFORMATION CONTACT: Jolie Harrison or Candace Nachman, Office of Protected Resources, NMFS, (301) 713–2289, or Monica DeAngelis, NMFS, (562) 980–3232.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the National Marine Fisheries Service (NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued. Under the MMPA, the term ''taking'' means to harass, hunt, capture, or kill or to attempt to harass, hunt, capture, or kill marine mammals.

Authorization may be granted for periods up to 5 years if NMFS finds, after notification and opportunity for public comment, that the taking will have a negligible impact on the species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. In addition, NMFS must prescribe regulations that include permissible methods of taking and other means effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance. The regulations must include requirements for monitoring and reporting of such taking.

Regulations governing the taking of Pacific harbor seals (*Phoca vitulina richardsi*), northern elephant seals (*Mirounga angustirostris*), California sea lions (*Zalophus californianus*), and northern fur seals (*Callorhinus ursinus*), by harassment, incidental to missile and rocket launches, aircraft flight test operations, and helicopter operations at VAFB, were issued on February 6, 2004 (69 FR 5720), and remain in effect until February 6, 2009. For detailed information on this action, please refer to that document. These regulations include mitigation, monitoring, and reporting requirements for the incidental take of marine mammals during missile and rocket launches at VAFB.

This LOA is effective from March 17, 2008 through February 6, 2009, and authorizes the incidental take of the four marine mammal species listed above that may result from the launching of up to 30 space and missile vehicles and up to 20 rockets annually from VAFB, as well as from aircraft and helicopter operations. Harbor seals haul-out on several sites on VAFB, and harbor seals, California sea lions, elephant seals, and northern fur seals are found on various haul-out sites and rookeries on San Miguel Island (SMI). Currently, six space launch vehicle programs use VAFB to launch satellites into polar orbit: Delta II, Taurus, Atlas V, Delta IV, Falcon, and Minotaur. Also a variety of small missiles, several types of interceptor and target vehicles, and fixed-wing aircrafts are launched from VAFB.

The activities under these regulations create two types of noise: continuous (but short-duration) noise, due mostly to combustion effects of aircraft and launch vehicles, and impulsive noise, due to sonic boom effects. Launch operations are the major source of noise on the marine environment from VAFB. The operation of launch vehicle engines produces significant sound levels. The noise generated by VAFB activities will result in the incidental harassment of pinnipeds, both behaviorally and in terms of physiological (auditory) impacts. The noise and visual disturbances from space launch vehicle and missile launches and aircraft and helicopter operations may cause the animals to move towards or enter the water. Take of pinnipeds will be minimized through implementation of the following mitigation measures: (1) all aircraft and helicopter flight paths must maintain a minimum distance of 1,000 ft (305 m) from recognized seal haul-outs and rookeries; (2) missile and rocket launches must, whenever possible, not be conducted during the harbor seal pupping season of March through June; (3) VAFB must avoid, whenever possible, launches which are predicted to produce a sonic boom on the Northern Channel Islands during harbor seal, elephant seal, and California sea lion pupping seasons, March through June; and (4) monitoring methods will be reviewed by NMFS if post-launch surveys determine that an injurious or lethal take of a marine mammal occurred. VAFB will also use monitoring surveys, audio-recording equipment, and time-lapse video to monitor the animals before, during, and after rocket launches, and to measure sound levels generated by the launches. Reports will be submitted to NMFS after each LOA expires, and a final comprehensive report, which will summarize all previous reports and assess cumulative impacts, will be submitted before the rule expires.

Summary of Request

On January 29, 2008, NMFS received a request for a LOA pursuant to the aforementioned regulations that would authorize, for a period not to exceed 1 year, take of marine mammals, by harassment, incidental to rocket and missile launches at VAFB.

Summary of Activity and Monitoring Under the Current LOA

In compliance with the 2007 LOA, VAFB submitted an annual report on the rocket launches at VAFB. A summary of that report (ManTech SRS Technologies, 2008) follows.

A total of three space vehicle launches and four launches of other vehicle types were conducted at VAFB between January 1, 2007, and December 31, 2007. The dates, locations, and monitoring required for the launches are summarized in Tables 1 and 2 below.

TABLE 1.—SUMMARY OF SPACE VEHICLE LAUNCHES AND MONITORING THAT OCCURRED AT VAFB IN 2007

Vehicle	Date	Time	Launch Site	Monitoring Conducted
Delta II COSMO–1	June 7	19:34	SLC–2	North VAFB
Delta II WorldView–1	Sep. 18	11:35	SLC–2	SMI
Delta II COSMO–2	Dec. 8	18:31	SLC–2	None

TABLE 2. SUMMARY OF OTHER LAUNCHES AND MONITORING THAT OCCURRED AT VAFB IN 2007.

Vehicle	Date	Time	Launch Site	Monitored
Minuteman III GT 193–GM	Feb. 7	00:15	LF–10	No
Minuteman II FTX–02	Mar. 20	21:27	LF–06	Yes
Minuteman II NFIRE–2A	Aug. 23	01:31	LF–06	No
Ground–based Interceptor FTG–03	Sep. 28	13:16	LF–23	No

The Delta II COSMO–2 launch occurred outside of the harbor seal pupping season, and a sonic boom of greater than 1 lb/ft^2 (psf) was not predicted to occur at SMI as a result of the launch; therefore, no biological or acoustical monitoring was required or conducted. Similarly, the Minuteman III GT 193–GM, Minuteman II NFIRE–2A, and the Ground-based Interceptor FTG–03 launches all occurred outside of the harbor seal pupping season; therefore, no biological or acoustical monitoring was required or conducted on VAFB.

In 2007, there were 12,793 tower operations and 299 range operations from the VAFB Airfield. Tower operations include all arrivals and departures from the airfield, while range operations include activities such as overflights, flight tests, etc. There were no observed impacts to pinnipeds from these activities. Also, no sea lion pups were born on VAFB in 2007.

Delta II COSMO–1

Although no sonic boom greater than 1 psf was predicted at SMI, the Delta II COSMO–1 vehicle was launched during the harbor seal pupping season; therefore, monitoring was required at VAFB. No acoustic monitoring was conducted at VAFB since the noise from this vehicle has been well quantified by measurements performed for previous launches of this vehicle. Monitoring surveys at the Spur Road haul-out site in the days surrounding the launch (June 4–9) revealed between zero and 15 adult and juvenile harbor seals, with daily maximums between one and 15 seals. No pups were seen during the monitoring period. Also, no pups were seen during the monthly census conducted on June 29. A video recording during the launch showed that only low numbers or no seals were generally present at the haul-out site in the morning, with numbers increasing in the early afternoon. No seals were present at the time of the launch. There was no evidence of injury, mortality, or abnormal behavior in any harbor seals at VAFB as a result of this launch.

Delta II WorldView–1

The Delta II WorldView–1 launch occurred outside of the harbor seal pupping season, so no monitoring was required or conducted on VAFB. However, a sonic boom of greater than 1 psf was predicted to reach SMI, so biological and acoustical monitoring were required at SMI. Monitoring at Point Bennett, specifically Northwest Cove, on SMI began on September 15 and included monitoring prior to, during, and immediately after the launch. Immediately prior to the launch, monitors were able to view 3,563 adult and pup California sea lions. The launch vehicle was not seen or heard during the launch window, and no sonic boom was heard or recorded. There were no visible movements outside of normal behaviors during or after the launch, and animals continued to haul out and persist in high numbers immediately after the launch. There was no evidence of injury, mortality, or abnormal behavior in any of the monitored pinnipeds on SMI as a result of this launch.

Minuteman II FTX–02

The Minuteman II FTX–02 was launched during harbor seal pupping season; therefore, monitoring was required at VAFB. Due to the westward launch trajectory, no sonic boom modeling or monitoring was required on SMI. Also, no acoustic recordings were required on VAFB, as noise from the Minuteman launch vehicle has been well quantified by measurements performed for previous Minutemen launches. Diurnal observations of harbor seals were conducted at the Lion's Head haul-out site between March 18 and March 23. Pre-launch counts (March 18–20) recorded between zero and six seals, and post-launch counts (March 21–23) fell within the pre-launch range, with a daily maximum of three to four seals. A follow-up survey on April 1 recorded six adult seals and one dependent pup. No pups were seen during the launch monitoring period. The highest number of seals (six) was seen on the day of the launch and prior to it, while the second highest number of seals (four) was seen on the day following the launch. The launch occurred after dark, and it was not possible to observe the seals' reactions to the launch or make a video recording of the seals' response to the launch noise. As the launch occurred at night and during a tide of 1.28 m (4.2 ft), when the Lion's Head site is mostly to completely under water, it is likely that few or no seals would have been hauled out during the launch. There was likely little or no effect on the haul-out behavior of harbor seals at Lion's Head as a reesult of this Minuteman II launch. There was no evidence of injury or mortality to any harbor seals monitored on VAFB as a result of this launch.

Authorization

The U.S. Air Force complied with the requirements of the 2007 LOA, and NMFS has determined that the marine mammal take resulting from the 2007 launches is within that analyzed in and anticipated by the associated regulations. Accordingly, NMFS has issued a LOA to the 30th Space Wing, U.S. Air Force authorizing the take by harassment of marine mammals incidental to missile and rocket launches at VAFB. Issuance of this LOA is based on findings described in the preamble to the final rule (67 FR 5720, February 6, 2004) and supported by information contained in VAFB's 2007 annual report that the activities described under this LOA will result in the take of small numbers of marine mammals and will have a negligible impact on marine mammal stocks. The provision requiring that the activity not have an unmitigable adverse impact on the availability of the affected species or stock for subsistence uses does not apply for this action.

Dated: March 11, 2008.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–5430 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE91

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Rocket Launches from Kodiak, AK

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice; Issuance of a Letter of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) and implementing regulations, notification is hereby given that a 1–year Letter of Authorization (LOA) has been issued to the Alaska Aerospace Development Corporation (AADC), to take Steller's sea lions (*Eumetopias jubatus*) and Pacific harbor seals (Phoca vitulina richardsi) incidental to rocket launches from the Kodiak Launch Complex (KLC).

DATES: Effective March 12, 2008, through March 11, 2009.

ADDRESSES: The LOA and supporting documentation are available by writing to Michael Payne, Chief, Permits, Conservation, and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225, by telephoning one of the contacts listed here (see **FOR FURTHER INFORMATION CONTACT**), or online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Howard Goldstein or Jaclyn Daly, Office of Protected Resources, NMFS, (301) 713–2289, or Brad Smith, Alaska Regional Office, NMFS, (907) 271–3023.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq*.) directs the National Marine Fisheries Service (NMFS) to allow, on request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued. Under the MMPA, the term ''taking'' means to harass, hunt, capture, or kill or to attempt to harass, hunt, capture or kill marine mammals.

Authorization may be granted for periods up to 5 years if NMFS finds, after notification and opportunity for public comment, that the taking will have a negligible impact on the species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. In addition, NMFS must prescribe regulations that include permissible methods of taking and other means effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance. The regulations must include requirements for monitoring and reporting of such taking.

Regulations governing the taking of Steller's sea lions (SSLs) and harbor seals, by harassment, incidental to rocket launches at KLC, became effective on February 27, 2006 (71 FR 4297), and remain in effect until February 28, 2011. For detailed information on this action, please refer to that document. These regulations include mitigation, monitoring, and reporting requirements for the incidental taking of marine mammals during rocket launches at KLC.

Summary of Request

NMFS received a request for an LOA pursuant to the aforementioned regulations that would re-authorize, for a period not to exceed 1 year, take of marine mammals incidental to rocket launches at KLC.

Summary of Activity and Monitoring Under the Current LOA

In compliance with the 2007 LOA, AADC submitted an annual report on the rocket launches at KLC. A summary of that report (R&M Consultants, 2008) follows.

FTG–03 Mission

Two launches were conducted at KLC between March 12, 2007, and March 11, 2008. The first was a monitored launch of a Flight Test Ground-based Interceptor–03 (FTG–03) target missile on May 25, 2007 at 06:00:00 hr ADT. Aerial surveys to document abundance of SSLs and harbor seals in the primary survey area (6–mile radius of the KLC launch pads) were flown using single-engine fixed-wing aircraft 2 days prior to (May 23), and 2 and 3 days (May 27 and 28) post launch. On May 24–26, 2007, three aerial surveys were canceled due to low ceilings and heavy fog. Poor weather conditions prevented the deployment of video and sound level monitoring equipment on the north side of Ugak Island, 4.2 miles (6.8 km) from the launch site, but a sound level meter was deployed on Narrow Cape, 0.9 miles (1.4 km) from the launch site. Sound level monitoring equipment at Narrow Cape registered noise above general ambient levels at 06:00:05 hr ADT for one minute eleven seconds. Noise levels peaked at 125.5 dBC.

No SSLs were observed at the traditional haul out sites at the north end or east side of Ugak Island during the aerial surveys conducted before and after the launch; therefore, no focused video monitoring was conducted at those sites. During the pre-launch aerial survey on May 23, 2007, 136 harbor seals were observed hauled out in the primary study area. Post launch surveys revealed 402 seals hauled out on May 27, 2007 and 224 seals on May 28, 2007. Harbor seals were counted consistently on Ugak Island, with the largest concentrations observed on the east side of Ugak Island. They were also occasionally seen at the mouth of Pasagshak Bay. Haul-out attendance within the primary survey area increased on days following the launch. Therefore, NMFS believes that harbor seal attendance at these haul-out sites was not affected negatively by this launch.

FTG–03a Mission

The second monitored launch of an Interceptor FTG–03a rocket was conducted at KLC on September 28, 2007 at 12:00:00 hr ADT. Aerial surveys to document abundance of SSLs and harbor seals were flown on all 3 days prior to, immediately after, and on 3 days post launch. Video monitoring equipment and a sound level meter were deployed on the north side of Ugak Island, 4.2 miles (6.8 km) from the launch site, and another sound level meter was deployed on Narrow cape, 0.9 miles (1.4 km) from the launch site. No SSLs were observed at the traditional haul out sites at the north end or east side of Ugak Island during the aerial surveys conducted before and after the launch. However, 2 SSLs were seen opportunistically in Pasagshak Bay prior to the monitoring surveys conducted for the launch.

Sound level monitoring equipment at Narrow Cape, which was placed in the same location as previous launches, registered noise above ambient levels at 12:00:05 hr ADT for one minute fourteen seconds, and at Ugak Island registered noise above ambient levels at 12:00:20 hr ADT for one minute thirty seconds. Noise levels peaked at 125.8 dBC for Narrow Cape and at 107.3 dBC for Ugak Island.

Since no SSLs were present at the traditional haul out sites, video monitoring for harbor seal reactions during the launch was conducted on the north side of Ugak Island. Harbor seal monitoring focused on preferred haul out sites could not be conducted due to the strong wind conditions that effected video equipment. Neither harbor seal presence or seal activity was observed during the ignition, during the peak noise levels that followed the launch, or for the remaining duration of the video monitoring (total video running time of 21 hrs 32 min). Harbor seals were observed in the largest concentrations on the east side of Ugak Island. During the pre-launch aerial surveys on September 27, 2007, 461 harbor seals were observed hauled out in the primary study area. Post launch surveys showed 0 seals hauled out on September 28, 175 seals on September 29, 686 seals on September 30, and 748 seals on October 1. Two additional pre-launch aerial surveys for monitoring purposes occurred on September 25 and 26, sighting 392 and 279 seals, respectively. Haul-out attendance increased within the primary survey area on days following the launch. Therefore, NMFS believes that harbor seal attendance at these haul-out sites was not affected negatively by this launch.

In summary, no impacts to any marine mammals were detected during the launches and no pinnipeds were observed during video monitoring. There was no evidence of injury or mortality as a result of the launches and numbers of hauled out animals were similar to or higher than pre-launch levels within 1 to 2 days of the launch.

Authorization

Accordingly, NMFS has issued an LOA to AADC authorizing takes of marine mammals incidental to rocket launches at the KLC. Issuance of this LOA is based on findings, described in the preamble to the final rule (71 FR 4297, January 26, 2006) and supported by information contained in AADC's required 2007 annual report, that the activities described under this LOA will result in the take of small numbers of marine mammals, have a negligible impact on marine mammal stocks, and will not have an unmitigable adverse impact on the availability of the affected marine mammal stocks for subsistence uses.

Dated: March 11, 2008.

James H. Lecky,

Director, Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–5433 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG30

U.S. Climate Change Science Program Synthesis and Assessment Product Draft Report 5.3 ''Decision Support Experiments and Evaluations Using Seasonal to Interannual Forecasts and Observational Data''

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice of availability and request for public comments.

SUMMARY: The National Oceanic and Atmospheric Administration publishes this notice to announce a 45-day public comment period for the draft report titled, U.S. Climate Change Science Program Synthesis and Assessment Product 5.3''Decision support experiments and evaluations using seasonal to interannual forecasts and observational data.''

This draft report is being released solely for the purpose of pre-dissemination peer review under applicable information quality guidelines. This document has not been formally disseminated by NOAA. It does not represent and should not be construed to represent any Agency policy or determination. After consideration of comments received on the draft report, a revised version along with the comments received will be published on the CCSP web site.

DATES: Comments must be received by May 2, 2008.

ADDRESSES: The draft Synthesis and Assessment Product: 5.3 ''Decision support experiments and evaluations using seasonal to interannual forecasts and observational data.'' is posted on the CCSP Web site at: *www.climatescience.gov/Library/sap/sap5–3/default.php*

Detailed instructions for making comments on this draft report are provided at the CCSP link. Comments must be prepared in accordance to these instructions and must be submitted to: *5.3–seasonal__DecisionSupport@usgcrp.gov*

FOR FURTHER INFORMATION CONTACT: Dr. Fabien Laurier, Climate Change Science Program Office, 1717 Pennsylvania Avenue NW, Suite 250, Washington, DC 20006, Telephone: (202)419–3481.

SUPPLEMENTARY INFORMATION: The CCSP was established by the President in 2002 to coordinate and integrate scientific research on global change and climate change sponsored by 13 participating departments and agencies of the U.S. Government. The CCSP is charged with preparing information resources that promote climate-related discussions and decisions, including scientific synthesis and assessment analyses that support evaluation of important policy issues.

Dated: March 11, 2008.

William J. Brennan,

Deputy Assistant Secretary of Commerce for International Affairs, and Acting Director, Climate Change Science Program.

[FR Doc. E8–5423 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–12–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG31

U.S. Climate Change Science Program Synthesis and Assessment Product Draft Report 2.4 ''Trends in Emissions of Ozone Depleting Substances, Ozone Layer Recovery, and Implications for Ultraviolet Radiation Exposure.''

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice of availability and request for public comments.

SUMMARY: The National Oceanic and Atmospheric Administration publishes this notice to announce a 45-day public comment period for the draft report titled, U.S. Climate Change Science Program Synthesis and Assessment Product 2.4 ''Trends in Emissions of Ozone Depleting Substances, Ozone Layer Recovery, and Implications for Ultraviolet Radiation Exposure.''

This draft report is being released solely for the purpose of pre-dissemination peer review under applicable information quality guidelines. This document has not been formally disseminated by NOAA. It does not represent and should not be construed to represent any Agency policy or determination. After consideration of comments received on the draft report, a revised version along with the comments received will be published on the CCSP web site.

DATES: Comments must be received by May 2, 2008.

ADDRESSES: The draft Synthesis and Assessment Product: 2.4 ''Trends in Emissions of Ozone Depleting Substances, Ozone Layer Recovery, and Implications for Ultraviolet Radiation Exposure.'' is posted on the CCSP Web site at:

http://www.climatescience.gov/Library/sap/sap2–4/default.php

Detailed instructions for making comments on this draft report are provided on the CCSP link. Comments must be prepared in accordance to these instructions and must be submitted to:

2.4–ozone@usgcrp.gov

FOR FURTHER INFORMATION CONTACT: Dr. Fabien Laurier, Climate Change Science Program Office, 1717 Pennsylvania Avenue NW, Suite 250, Washington, DC 20006, Telephone: (202)419–3481.

SUPPLEMENTARY INFORMATION: The CCSP was established by the President in 2002 to coordinate and integrate scientific research on global change and climate change sponsored by 13 participating departments and agencies of the U.S. Government. The CCSP is charged with preparing information resources that promote climate-related discussions and decisions, including scientific synthesis and assessment analyses that support evaluation of important policy issues.

Dated: March 11, 2008.

William J. Brennan,

Deputy Assistant Secretary of Commerce for International Affairs, and Acting Director, Climate Change Science Program.

[FR Doc. E8–5443 Filed 3–17–08; 8:45 am]

BILLING CODE 3510–12–S

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Wednesday April 2, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Risk Surveillance.

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 08–1046 Filed 3–14–08; 11:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday April 25, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 08–1047 Filed 3–14–08; 11:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday April 18, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 08–1048 Filed 3–14–08; 11:45 am]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday April 11, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 08–1049 Filed 3–14–08; 11:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday April 4, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 08–1050 Filed 3–14–08; 11:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Thursday, April 10, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement Matters.

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 08–1051 Filed 3–14–08; 11:45 am]

BILLING CODE 6351–01–M

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0029]

Federal Acquisition Regulation; Information Collection; Extraordinary Contractual Action Requests

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR)

Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning extraordinary contractual action requests. A request for public comments was published in the **Federal Register** at 73 FR 3241, on January 17, 2008. No comments were received. The clearance currently expires on April 30, 2008.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before April 17, 2008.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4035, Washington, DC 20405. Please cite OMB Control No. 9000–0029, Extraordinary Contractual Action Requests, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Ed Loeb, Contract Policy Division, GSA (202) 501–0650.

SUPPLEMENTARY INFORMATION:

A. Purpose

This request covers the collection of information as a first step under Public Law 85–804, as amended by Public Law 93–155 and Executive Order 10789 dated November 14, 1958, that allows contracts to be entered into, amended, or modified in order to facilitate national defense. In order for a firm to be granted relief under the Act, specific evidence must be submitted which supports the firm's assertion that relief is appropriate and that the matter cannot be disposed of under the terms of the contract.

B. Annual Reporting Burden

Respondents: 100.
Responses per Respondent: 1.
Annual Responses: 100.
Hours per Response: 16.
Total Burden Hours: 1600.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (VPR), Room 4035, 1800 F Street, NW., Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0029, Extraordinary Contractual Action Requests, in all correspondence.

Dated: March 11, 2008.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. E8–5396 Filed 3–17–08; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

Department of the Air Force

U.S. Air Force Scientific Advisory Board Notice of Meeting

AGENCY: Department of the Air Force, U.S. Air Force Scientific Advisory Board.

ACTION: Meeting notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the United States Air Force Scientific Advisory Board meeting will take place on Wednesday, April 9th, 2008, from 8 a.m.–4:15 p.m., at the Offutt Air Force Base Dougherty Conference Center located at 906 SAC Blvd., Offutt AFB, Nebraska 68113.

The purpose of the meeting is to hold the United States Air Force Scientific Advisory Board quarterly meeting to introduce information related to the Offutt Air Force Base 55th Wing and U.S. Strategic Command missions. This information will provide board members a valuable perspective of key missions currently being executed by the USAF and how they may relate to the on-going SAB studies: Airborne Tactical Laser Feasibility for Gunship Operations, Kinetic Precision Effects, Implications of Spectrum Management for the Air Force, and Defending and Operating in a Contested Cyber Domain.

Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.155, the Administrative Assistant of the Air Force, in consultation with the Office of the Air Force General Counsel, has determined in writing that the public interest requires that all sessions of the United States Air Force Scientific Advisory Board meeting be closed to the public because they will be concerned with classified information and matters covered by sections 5 U.S.C. 552b(c)(1), (4), and (9)(b).

Any member of the public wishing to provide input to the United States Air Force Scientific Advisory Board should submit a written statement in accordance with 41 CFR 102–3.140(c) and section 10(a)(3) of the Federal Advisory Committee Act and the procedures described in this paragraph. Written statements can be submitted to the Designated Federal Officer at the address detailed below at any time. Statements being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Officer at the address listed below at least five calendar days prior to the meeting which is the subject of this notice. Written statements received after this date may not be provided to or considered by the United States Air Force Scientific Advisory Board until its next meeting. The Designated Federal Officer will review all timely submissions with the United States Air Force Scientific Advisory Board Chairperson and ensure they are provided to members of the United States Air Force Scientific Advisory Board before the meeting that is the subject of this notice.

FOR FURTHER INFORMATION CONTACT: The United States Air Force Scientific Advisory Board Executive Director and Designated Federal Officer, Lt. Col. David J. Lucia, 703–697–8288, United States Air Force Scientific Advisory Board, 1080 Air Force Pentagon, Room 4C759, Washington, DC 20330–1080, *david.lucia@pentagon.af.mil.*

Bao-Anh Trinh,

Air Force Federal Register Liaison Officer.

[FR Doc. E8–5386 Filed 3–17–08; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Intent (NOI) To Prepare an Environmental Impact Statement (EIS) for Transformation-Related Increased Training at Fort Benning, GA (Maneuver Center of Excellence EIS)

AGENCY: Department of the Army, DoD.

ACTION: Notice of Intent.

SUMMARY: In order to transform the Army, meet the increased national security and defense requirements of the 21st century, maintain training and operational readiness levels of the force,

and preserve a high quality of life for U.S. Army Soldiers and Families, the Army has identified the need to increase its overall size while continuing to restructure its forces in accordance with modular Transformation decisions. On December 19, 2007, the Army signed a Record of Decision (ROD) documenting its decision to proceed with growth of the Active and Reserve components of the Army by 74,200 Soldiers through establishment of several new Brigade Combat Teams (BCTs) and Combat Support and Combat Support Service units (CS/CSS). The growth of the Army would allow for the adjustment of the composition of its forces to continue to accommodate Transformation objectives and create additional unit capabilities in high demand areas where mission requirements exceed current manning authorizations. The Army growth decision will result in increased demands for the use of Fort Benning. Fort Benning will prepare a Maneuver Center of Excellence EIS to analyze Grow the Army (GTA) site-specific requirements and additional actions needed to support Base Realignment and Closure (BRAC) implementation at Fort Benning.

In 2007 Fort Benning prepared a Final EIS for proposed Transformation and Base Realignment and Closure activities and signed a ROD selecting an alternative to proceed with several necessary projects and activities (Final EIS for BRAC 05 Realignment and Transformation Actions at Fort Benning, October 2007). Although Fort Benning itself will not experience permanent force structure growth beyond that analyzed in the BRAC 05 Realignment and Transformation EIS, it will be required to increase training of transient student loads in order to achieve and maintain the Army end-strength growth. The Fort Benning Maneuver Center of Excellence EIS will therefore consider a proposed action and reasonable alternatives for the Army to increase facilities at Fort Benning to accommodate training requirements related to BRAC, Global Defense Posture Realignment (GDPR), Army Modular Force Initiatives (AMF), GTA and other related stationing activities.

ADDRESSES: For further information regarding the EIS, please contact Mr. John Brent, Fort Benning Directorate of Public Works, Environmental Management Division, Bldg #6 (Meloy Hall), Room 310, Fort Benning, GA 31905. Written comments may be sent to Ms. Manganaro at 6751 Constitution Loop, Suite 550, Fort Benning, Georgia 31905.

FOR FURTHER INFORMATION CONTACT: Ms. Monica Manganaro, Fort Benning Public Affairs Office at (706) 545–3438, or Mr. Brandon Cockrell at (706) 545–3210 during normal business hours.

SUPPLEMENTARY INFORMATION: Fort Benning consists of 181,275 acres of DoD-managed land south and east of Columbus, Georgia on the banks of the Chattahoochee River in eastern Alabama and western Georgia.

The Maneuver Center of Excellence EIS is directly related to the BRAC 05 Realignment and Transformation Actions at Fort Benning EIS and the Programmatic EIS for Army Growth and Force Structure Realignment. The Maneuver Center of Excellence EIS will analyze impacts as a result of continuing Army Transformation actions at Fort Benning, including newly identified projects that are required to support GTA, and 2 changes or additions to BRAC and Transformation projects (including GDPR and AMF) as analyzed in the BRAC 05 Realignment and Transformation EIS.

The proposed action would include the construction, maintenance and operation of additional facilities, training areas, including ranges and maneuver areas to support new units and activities.

The Maneuver Center of Excellence EIS will analyze the impact of several alternatives including the No Action Alternative. Alternatives to be examined by the EIS may consist of alternative siting locations within Fort Benning for facility and range construction projects, selection of new construction only, renovation and use of existing facilities, or a combination of both new construction and use of existing facilities, and varying intensity and use of maneuver areas within Fort Benning for training activities. Other alternatives may be identified during the public scoping process.

Impacts analyzed will include a wide range of environmental resource areas including, but not limited to, air quality, traffic, noise, water resources, biological resources, cultural resources, socioeconomics, utilities, land use, solid and hazardous materials/waste, and cumulative environmental effects. Impacts to biological and water resources, air quality, and utilities could possibly be significant. Additional resources and conditions may be identified as a result of the scoping process initiated by this NOI. The public will be invited to participate in the 30-day scoping process which includes a scoping meeting and commenting on the proposed action, alternatives, and environmental issues of concern to be considered and addressed in the EIS. Opportunities for public participation will be announced in the local news media and at Fort Benning's Web site at *https://www.benning.army.mil/EMD/program/legal/index.htm*. Comments from the public will be considered before completion of a Draft EIS (DEIS). Following completion of a DEIS the public will have an additional opportunity for review and comment. The FEIS will make appropriate changes based on public comments and will be released to the public for a 30-day waiting period. After fully considering the FEIS, including any public comments, the Army will sign a Record of Decision (ROD) choosing an alternative to implement the proposed action at Fort Benning. The ROD will not be signed prior to the expiration of 30 days from the publication of the Notice of Availability (NOA) of the FEIS.

Dated: March 10, 2008.

Addison D. Davis, IV

Deputy Assistant Secretary of the Army, (Environment, Safety and Occupational Health).

[FR Doc. E8–5219 Filed 3–17–08; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services; List of Correspondence

AGENCY: Department of Education.

ACTION: List of Correspondence from October 1, 2007 through December 31, 2007.

SUMMARY: The Secretary is publishing the following list pursuant to section 607(f) of the Individuals with Disabilities Education Act, (IDEA). Under section 607(f) of IDEA, the Secretary is required, on a quarterly basis, to publish in the **Federal Register** a list of correspondence from the U.S. Department of Education (Department) received by individuals during the previous quarter that describes the interpretations of the Department of IDEA or the regulations that implement IDEA.

FOR FURTHER INFORMATION CONTACT: Melisande Lee or JoLeta Reynolds. Telephone: (202) 245–7468.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain a copy of this notice in an

alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact persons listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION: The following list identifies correspondence from the Department issued from October 1, 2007 through December 31, 2007. Included on the list are those letters that contain interpretations of the requirements of IDEA and its implementing regulations, as well as letters and other documents that the Department believes will assist the public in understanding the requirements of the law and its regulations. The date of and topic addressed by each letter are identified, and summary information is also provided, as appropriate. To protect the privacy interests of the individual or individuals involved, personally identifiable information has been deleted, as appropriate.

Part A—General Provisions

Section 602—Definitions

Topic Addressed: Child With a Disability

- Letter dated November 28, 2007 to individual (personally identifiable information redacted), regarding criteria for making eligibility determinations under Part B of IDEA.

Part B—Assistance for Education of All Children With Disabilities

Section 612—State Eligibility

Topic Addressed: Child Find

- Letter dated December 21, 2007 to Texas Education Agency General Counsel David Anderson, Esq., clarifying that a State has no child find obligations under Part B of IDEA to children housed in a U.S. Immigration and Customs Enforcement residential facility.

Topic Addressed: Least Restrictive Environment

- Letter dated November 30, 2007 to Chapman Management Group member Tom Trigg, clarifying the placement requirements in Part B of IDEA.

Topic Addressed: Methods of Ensuring Services

- Letter dated December 20, 2007 to Indiana Department of Education Medicaid Liaison John Hill, clarifying whether school-based Medicaid billing is optional or required under IDEA.

Topic Addressed: Personnel Qualifications

- Letter dated November 7, 2007 to Mountain Plains Regional Resource Center Director Dr. John Copenhaver, clarifying the relationship between the requirements regarding highly qualified teachers and the provision of extended school year services.

Topic Addressed: Prohibition on Mandatory Medication

- Letter dated October 22, 2007 to U.S. Senator James M. Inhofe regarding the application and implementation of the statutory prohibition on mandatory medication.

Section 614—Evaluations, Eligibility Determinations, Individualized Education Programs, and Educational Placements

Topic Addressed: Evaluations, Parental Consent, and Reevaluations

- Letter dated October 19, 2007 to Mountain Plains Regional Resource Center Director Dr. John Copenhaver, clarifying the application of the requirements for parent consent for initial evaluations when a response to intervention process is used for evaluating children with disabilities.
- Letter dated October 19, 2007 to Bowling Green State University Special Needs Assistant Brigitte Green-Churchwell, explaining that an evaluation under Part B of IDEA is not required before terminating a child's eligibility due to graduation from secondary school with a regular diploma or due to exceeding the age of eligibility for a free appropriate public education under State law.

Section 615—Procedural Safeguards

Topic Addressed: Independent Educational Evaluations

- Letter dated December 21, 2007 to California Attorney Nancy J. LoDolce, clarifying whether age and grade level scores, along with recommendations pertaining to specific methodologies and/or use of materials, can be included in evaluations conducted by independent educational evaluators.

Topic Addressed: Procedural Safeguards Notice

- Letter dated November 30, 2007 to Texas Education Agency Special Programs Director Kathy Clayton, regarding a State's obligation to communicate to parents the information contained in the procedural safeguards notice under Part B of IDEA.
- Letter dated November 14, 2007, to Virginia Assistant Superintendent for Special Education and Student Services H. Douglas Cox, regarding a revision to the procedural safeguards notice model form developed by the Office of Special Education Programs.

Topic Addressed: Impartial Due Process Hearing

- Letter dated October 25, 2007 to Advocacy Center for Persons with Disabilities Education Team Manager Robert Jacobs, clarifying whether a State educational agency (SEA) may contract with another agency to hold due process hearings for the SEA and the applicable appeals process.
- Letter dated December 12, 2007 to Connecticut Attorney David Shaw, regarding State rules for hearing officer review of negotiated settlement agreements reached outside of mediation or the resolution process and enforcement of these settlement agreements.

Part C—Infants and Toddlers With Disabilities

Section 635—Requirements for a Statewide System

Topic Addressed: Complaint Resolution

- Letter dated November 28, 2007 to Connecticut Attorney Lawrence W. Berliner, regarding Part C complaint resolution procedures and clarifying that the current Part C regulations do not give an early intervention services provider an opportunity to respond to a complaint.

Other Letters That Do Not Interpret Idea but May Be of Interest to Readers

Topic Addressed: Accelerated Programs

- Dear Colleague Letter dated December 26, 2007 from the Department's Office for Civil Rights Assistant Secretary Stephanie Monroe, regarding issues in the enrollment of students with disabilities in accelerated programs such as Advanced Placement and International Baccalaureate classes or programs.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister/index.html*.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll-free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal**

Register. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html*.

(Catalog of Federal Domestic Assistance Number 84.027, Assistance to States for Education of Children with Disabilities)

Dated: March 12, 2008.

Tracy R. Justesen,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. E8–5462 Filed 3–17–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

March 10, 2008.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC08–49–000.

Applicants: Southaven Power, LLC; Kelson Energy III LLC.

Description: Southaven Power, LLC and Kelson Energy III LLC submit an application for order authorizing disposition of jurisdictional facilities.

Filed Date: 02/26/2008.

Accession Number: 20080305–0049.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 18, 2008.

Docket Numbers: EC08–50–000.

Applicants: Entergy Services, Inc.; Entergy Nuclear Generation Company; Entergy Nuclear Fitzpatrick, LLC; Entergy Nuclear Indian Point 2, LLC; Entergy Nuclear Indian Point 3, LLC; Entergy Nuclear Palisades, LLC; Entergy Nuclear Vermont Yankee, LLC; Entergy Power Ventures, L.P.; Entergy Nuclear Power Marketing, LLC; EWO Marketing, LP; Warren Power, LLC; EAM Nelson Holding, LLC; Entergy Power, Inc.

Description: Entergy Nuclear Generation Company et al. submit the Joint Application for authorization to acquire securities.

Filed Date: 03/04/2008.

Accession Number: 20080306–0017.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 25, 2008.

Docket Numbers: EC08–51–000.

Applicants: IPP Energy LLC; Standard Binghamton LLC.

Description: Standard Binghamton LLC et al. submits a Joint Application for Authorization under section 203 of the Federal Power Act.

Filed Date: 03/04/2008.

Accession Number: 20080306–0030.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 25, 2008.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG08–48–000.

Applicants: Standard Binghamton LLC.

Description: Standard Binghamton LLC submits a notice of self-certification of exempt wholesale generator status under EG08–48.

Filed Date: 03/04/2008.

Accession Number: 20080306–0026.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 25, 2008.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER96–1088–046; ER02–2199–011; ER03–54–011; ER03–56–011; ER01–1114–012; ER97–2758–019.

Applicants: WPS Energy Services, Inc.; WPS Empire State, Inc.; WPS Beaver Falls Generation, Inc.; WPS Syracuse Generation, LLC; WPS Westwood Generation, DDC; Advantage Energy, Inc.

Description: Application by Integrys Northeast Companies for Category 1 Status and Alternatives Request for Category 2 Exempt pursuant to Paragraph 868 or Order 697 re WPS Energy Services Inc *et al.*

Filed Date: 02/29/2008.

Accession Number: 20080306–0016.

Comment Date: 5 p.m. Eastern Time on Friday, March 21, 2008.

Docket Numbers: ER03–478–021; ER08–387–003; ER06–200–014; ER07–254–006; ER03–1326–014; ER07–460–005; ER05–534–015; ER05–365–015; ER05–1262–014; ER06–1093–010; ER03–296–017; ER01–3121–016; ER02–418–015; ER03–416–018; ER05–332–015; ER07–287–008; ER07–242–008; ER03–951–017; ER04–94–015; ER02–417–015; ER07–1378–005; ER05–1146–015; ER05–481–015; ER07–240–009; ER07–195–006; ER02–2085–010.

Applicants: PPM Energy; Atlantic Renewables Projects II LLC; Big Horn Wind Project LLC; Casselman Windpower, LLC; Colorado Green Holdings, LLC; Dillon Wind LLC; Eastern Desert Power LLC; Elk River Windfarm LLC; Flat Rock Windpower LLC; Flat Rock Windpower II LLC; Flying Cloud Power Partners, LLC; Klamath Energy LLC; Klamath Generation LLC; Klondike Wind Power LLC; Klondike Wind Power II LLC; Klondike Wind Power III LLC; MinnDakota Wind LLC; Moraine Wind LLC; Mountain View Power Partners III, LLC; Phoenix Wind Power LLC; Providence Heights Wind, LLC; Shiloh I Wind Project, LLC; Trimont Wind I LLC; Twin Buttes Wind LLC; Locust Ridge Wind Farm, LLC; Northern Iowa Windpower II, LLC.

Description: PPM Energy Inc et al. notify FERC of a change in status resulting from the completion of the transaction authorized by FERC in its order issued on 1/24/08.

Filed Date: 02/28/2008.

Accession Number: 20080306–0018.

Comment Date: 5 p.m. Eastern Time on Thursday, March 20, 2008.

Docket Numbers: ER03–478–022; ER08–387–004; ER06–200–015; ER07–254–007; ER03–1326–015; ER07–460–006; ER05–534–016; ER05–365–016; ER05–1262–015; ER06–1093–011; ER03–296–018; ER01–3121–017; ER02–418–016; ER03–416–019; ER05–332–016; ER07–287–009; ER07–242–009; ER03–951–018; ER04–94–016; ER02–417–016; ER07–1378–006; ER05–1146–016; ER05–481–016; ER07–240–010; ER07–195–007; ER02–2085–011.

Applicants: PPM Energy; Atlantic Renewables Projects II LLC; Big Horn Wind Project LLC; Casselman Windpower, LLC; Colorado Green Holdings, LLC; Dillon Wind LLC; Eastern Desert Power LLC; Elk River Windfarm LLC; Flat Rock Windpower LLC; Flat Rock Windpower II LLC; Flying Cloud Power Partners, LLC; Klamath Energy LLC; Klamath Generation LLC; Klondike Wind Power LLC; Klondike Wind Power II LLC; Klondike Wind Power III LLC; MinnDakota Wind LLC; Moraine Wind LLC; Mountain View Power Partners III, LLC; Phoenix Wind Power LLC; Providence Heights Wind, LLC; Shiloh I Wind Project, LLC; Trimont Wind I LLC; Twin Buttes Wind LLC; Locust Ridge Wind Farm, LLC; Northern Iowa Windpower II, LLC.

Description: The Iberdrola Companies submit a Notice of Change with respect to the acquisition of an interest in MinnDakota Wind LLC that they inadvertently failed to file with the 10/25/07 *et al.* submittals.

Filed Date: 03/03/2008.

Accession Number: 20080306–0019.

Comment Date: 5 p.m. Eastern Time on Monday, March 24, 2008.

Docket Numbers: ER03–1094–003; ER07–955–001.

Applicants: Southern California Edison Company.

Description: Southern California Edison Co submits workpapers showing the monthly amounts paid, revenue receipt dates and the monthly interest calculations for each month re its Refund Report.

Filed Date: 03/04/2008.

Accession Number: 20080307–0083.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 25, 2008.

Docket Numbers: ER05–6–104; EL04–135–107; EL02–111–124; EL03–212–120.

Applicants: Midwest Independent System Operator, Inc.

Description: Midwest Independent Transmission System Operation Inc *et al.* submits the Joint Operating Agreement between the Midwest Independent Transmission System Operation Inc and PJM Interconnection, LLC to comply with the 30 day compliance filing etc.

Filed Date: 03/03/2008.

Accession Number: 20080306–0023.

Comment Date: 5 p.m. Eastern Time on Monday, March 24, 2008.

Docket Numbers: ER06–738–010; ER06–739–010; ER03–983–009; ER07–501–006; ER02–537–013; ER07–758–005.

Applicants: Fox Energy Company LLC; Birchwood Power Partners, L.P.; Inland Empire Energy Center, L.L.C.; Shady Hills Power Company, L.L.C.; Cogen Technologies Linden Ventures, L.P.; East Coast Power Linden Holding, LLC.

Description: Notice of Change in Status of East Coast Power Linden Holding, LLC, *et al.*

Filed Date: 03/05/2008.

Accession Number: 20080307–5042.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 26, 2008.

Docket Numbers: ER07–546–012; ER07–938–001.

Applicants: ISO New England Inc.

Description: ISO New England Inc submits Report on Seasonal Resources to comply with FERC's 4/16/07 Order.

Filed Date: 02/29/2008.

Accession Number: 20080305–0040.

Comment Date: 5 p.m. Eastern Time on Friday, March 21, 2008.

Docket Numbers: ER08–194–002.

Applicants: Duquesne Light Company.

Description: Duquesne Light Company 45-day compliance filing responding to FERC's 1/17/08 Order.

Filed Date: 03/03/2008.

Accession Number: 20080306–5035.

Comment Date: 5 p.m. Eastern Time on Monday, March 24, 2008.

Docket Numbers: ER08–495–001.

Applicants: Kimberly-Clark Corporation.

Description: Kimberly-Clark Corp submits an Amendment to the Petition for Acceptance of Initial Rate Schedule, Waivers and Blanket Authority.

Filed Date: 03/05/2008.

Accession Number: 20080306–0045.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 26, 2008.

Docket Numbers: ER08–503–001.

Applicants: MidAmerican Energy Company.

Description: MidAmerican Energy Company submits Substitute Original Issue Sheet 3 and 4.

Filed Date: 03/05/2008.

Accession Number: 20080307–0073.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 26, 2008.

Docket Numbers: ER08–563–001.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection LLC submits an executed interconnection service agreement with Shaffer Mountain Wind LLC et al., designated as Original Service Agreement 1843 under ER08–563.

Filed Date: 02/29/2008.

Accession Number: 20080306–0022.

Comment Date: 5 p.m. Eastern Time on Friday, March 21, 2008.

Docket Numbers: ER08–635–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, LLC submits an executed service agreement for network integration transmission service.

Filed Date: 03/04/2008.

Accession Number: 20080306–0044.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 25, 2008.

Docket Numbers: ER08–636–000.

Applicants: Standard Binghamton LLC.

Description: Stand Binghamton LLC submits a Petition for Acceptance of Initial Rate Schedule, Waivers and Blanket Authority.

Filed Date: 03/04/2008.

Accession Number: 20080306–0043.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 25, 2008.

Docket Numbers: ER08–637–000.

Applicants: Midwest Independent Transmission System.

Description: Midwest Independent Transmission System Operator, Inc et al. submits proposed revisions to its Open Access Transmission and Energy Markets Tariff, to be effective 6/1/08.

Filed Date: 03/04/2008.

Accession Number: 20080306–0047.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 25, 2008.

Docket Numbers: ER08–638–000.

Applicants: Crafton LLC.

Description: Crafton LLC submits petition for acceptance of FERC Electric Tariff, Original Volume 1, waivers and blanket authority.

Filed Date: 03/05/2008.

Accession Number: 20080307–0075.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 26, 2008.

Docket Numbers: ER08–639–000.

Applicants: Midwest Independent Transmission System.

Description: Midwest Independent Transmission System Operator Inc submits a notice of cancellation of Service Agreement 5 to FERC Electric Tariff, Third Revised Volume 1.

Filed Date: 03/05/2008.

Accession Number: 20080307–0076.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 26, 2008.

Docket Numbers: ER08–640–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection LLC submits an executed interconnection construction service agreement with Conectiv Atlantic Generation, LLC etc.

Filed Date: 03/05/2008.

Accession Number: 20080307–0077.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 26, 2008.

Docket Numbers: ER08–642–000.

Applicants: ENDEAVOR POWER PARTNERS, LLC.

Description: Endeavor Power Partners, LLC submits a notice of termination of FERC Electric Tariff, Original Volume 1.

Filed Date: 03/04/2008.

Accession Number: 20080306–0046.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 25, 2008.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES08–26–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM supplements its Application by submitting revised 2006 to 2008 computations of interest coverage to replace the computations of interest coverage originally submitted.

Filed Date: 03/05/2008.

Accession Number: 20080307–5012.

Comment Date: 5 p.m. Eastern Time on Monday, March 17, 2008.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA07–25–002.

Applicants: DUKE ENERGY CAROLINAS, LLC.

Description: Duke Energy Carolinas LLC submits its open access tariff compliance filing.

Filed Date: 03/03/2008.

Accession Number: 20080306–0025.

Comment Date: 5 p.m. Eastern Time on Monday, March 24, 2008.

Docket Numbers: OA07–50–001.

Applicants: Alcoa Power Generating Inc.—Yadkin.

Description: Alcoa Power Generating, Inc submits its clean and blacklined Open Access Transmission Tariff sheets containing the requested revisions.

Filed Date: 03/03/2008.

Accession Number: 20080306–0027.

Comment Date: 5 p.m. Eastern Time on Monday, March 24, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–5365 Filed 3–17–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

March 11, 2008.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER98–4421–009; ER96–2350–028; ER99–791–007; ER99–806–006; ER99–3677–008; ER01–570–009; ER00–2187–004.

Applicants: Consumers Energy Company; CMS Energy Resource Management Company; Grayling Generating Station Limited Partnership; Genesee Power Station Ltd. Partnership; CMS Generation Michigan Power, L.L.C.; Dearborn Industrial Generation, L.L.C.; CMS Distributed Power, L.L.C.

Description: Consumers Energy submits a notice of non-material change in status in connection with Consumers' acquisition of the Zeeland Power Company *et al.*

Filed Date: 03/06/2008.

Accession Number: 20080310–0180.

Comment Date: 5 p.m. Eastern Time on Thursday, March 27, 2008.

Docket Numbers: ER00–1026–015.

Applicants: Indianapolis Power & Light Company.

Description: Indianapolis Power & Light Co submits a change in status filing re the acquisition of the Georgetown Unit 4.

Filed Date: 02/27/2008.

Accession Number: 20080303–0209.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 19, 2008.

Docket Numbers: ER06–615–021; ER02–1656–036; ER07–1257–003; EL08–20–000; EL05–146–007.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator submits the instant filing in compliance with Commission's Order on Clarification.

Filed Date: 03/05/2008.

Accession Number: 20080310–0181.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 26, 2008.

Docket Numbers: ER08–106–001.

Applicants: Pacific Gas and Electric Company.

Description: Compliance Refund Report re: the Nineteenth Quarterly Filing of Facilities Agreements between PG&E and CCSF of Pacific Gas and Electric Company.

Filed Date: 03/10/2008.

Accession Number: 20080311–5002.

Comment Date: 5 p.m. Eastern Time on Monday, March 31, 2008.

Docket Numbers: ER08–356–001.

Applicants: Dynegy Power Marketing, Inc.

Description: Dynegy Power Marketing Inc submits their responses to FERC's Request Letter dated 2/15/08.

Filed Date: 03/07/2008.

Accession Number: 20080311–0156.

Comment Date: 5 p.m. Eastern Time on Friday, March 28, 2008.

Docket Numbers: ER08–358–001.

Applicants: Commonwealth Edison Company.

Description: Commonwealth Edison of Indiana Inc's CD containing their Response to Deficiency Letter issued by FERC Trail Staff on 2/15/08.

Filed Date: 03/06/2008.

Accession Number: 20080306–4007.

Comment Date: 5 p.m. Eastern Time on Thursday, March 27, 2008.

Docket Numbers: ER08–422–001; ER08–423–001.

Applicants: Puget Sound Energy, Inc.

Description: Puget Sound Energy, Inc submits a network Integration Transmission Service Agreement designated as FERC Rate Schedule 438, Original Sheet 1–14 with Bonneville Power Administration etc.

Filed Date: 03/07/2008.

Accession Number: 20080311–0160.

Comment Date: 5 p.m. Eastern Time on Friday, March 28, 2008.

Docket Numbers: ER08–510–001.

Applicants: Xcel Energy Services Inc.

Description: Northern States Power Company et al. submits an Amendment to their filing dated 1/31/08 of Notices of Cancellation for 109 legacy point-to-point transmission service agreements w/Luverne Municipal Utilities.

Filed Date: 03/07/2008.

Accession Number: 20080311–0155.

Comment Date: 5 p.m. Eastern Time on Friday, March 28, 2008.

Docket Numbers: ER08–577–001.

Applicants: Noble Bellmont Windpark, LLC.

Description: Noble Bellmont Windpark, LLC submits an amendment to their 2/19/08 application for authorization to sell electric energy, capacity and ancillary services at market based rates.

Filed Date: 03/07/2008.

Accession Number: 20080311–0158.

Comment Date: 5 p.m. Eastern Time on Friday, March 21, 2008.

Docket Numbers: ER08–578–001.

Applicants: Noble Chateaugay Windpark, LLC.

Description: Noble Chateaugay Windpark, LLC submits an amendment to their 2/19/08 application to sell electric energy, capacity and ancillary services at market-based rates.

Filed Date: 03/07/2008.

Accession Number: 20080311–0157.

Comment Date: 5 p.m. Eastern Time on Friday, March 21, 2008.

Docket Numbers: ER08–579–001.

Applicants: Noble Wethersfield Windpark, LLC.

Description: Noble Wethersfield Windpark, LLC submits an amendment to their 2/19/08 application for authorization to sell electric energy, capacity and ancillary services at market-based rates.

Filed Date: 03/07/2008.

Accession Number: 20080311–0159.

Comment Date: 5 p.m. Eastern Time on Friday, March 21, 2008.

Docket Numbers: ER08–615–001.

Applicants: Central Vermont Public Service Corp.

Description: The Filing Schedule 20A Service Providers submits its 1st Revised Sheet 1023 to Schedule 20A–GMP of the ISO New England Inc Open Access Transmission Tariff which was inadvertently designated as Orig Sheet 1023 etc.

Filed Date: 03/07/2008.

Accession Number: 20080311–0152.

Comment Date: 5 p.m. Eastern Time on Friday, March 28, 2008.

Docket Numbers: ER08–616–000.

Applicants: Avista Corporation.

Description: Avista Corp submits revised sheets to its Amended and Restated Power Transfer Agreement with Public Utility District #2 of Grant County, WA.

Filed Date: 02/29/2008.

Accession Number: 20080304–0235.

Comment Date: 5 p.m. Eastern Time on Friday, March 21, 2008.

Docket Numbers: ER08–620–000.

Applicants: Luke Paper Company.

Description: Luke Paper Company submits Application for Market-Based Rate Authorization, Certain Waivers and Blanket Authorizations under ER08–620.

Filed Date: 02/29/2008.

Accession Number: 20080304–0233.

Comment Date: 5 p.m. Eastern Time on Friday, March 21, 2008.

Docket Numbers: ER08–622–000.

Applicants: Midwest Independent Transmission System.

Description: Midwest Independent Transmission System Operator Inc submits proposed revisions to the Credit Policy in Attachment L of the Open Access Transmission and Energy Markets Tariff.

Filed Date: 02/29/2008.

Accession Number: 20080304–0231.

Comment Date: 5 p.m. Eastern Time on Friday, March 21, 2008.

Docket Numbers: ER08–641–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection LLC submits an executed Interconnection Service Agreement with Pennsylvania Renewable Resources Associates and Pennsylvania Electric Company *et al.*

Filed Date: 03/06/2008.

Accession Number: 20080307–0080.

Comment Date: 5 p.m. Eastern Time on Thursday, March 27, 2008.

Docket Numbers: ER08–643–000.

Applicants: Duke Energy Indiana, Inc.

Description: Duke Energy Indiana Inc submits FERC Electric Rate Schedule 1.

Filed Date: 03/06/2008.

Accession Number: 20080307–0081.

Comment Date: 5 p.m. Eastern Time on Thursday, March 27, 2008.

Docket Numbers: ER08–644–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits Small Generator Interconnection Agreement and the Service Agreement for Wholesale Distribution Service with Garnet Energy Corp.

Filed Date: 03/06/2008.

Accession Number: 20080307–0082.

Comment Date: 5 p.m. Eastern Time on Thursday, March 27, 2008.

Docket Numbers: ER08–645–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits an executed Service Agreement for Network Integration Transmission Service between SPP as Transmission Provider and The Empire District Electric Company as Network Customer.

Filed Date: 03/06/2008.

Accession Number: 20080310–0184.

Comment Date: 5 p.m. Eastern Time on Thursday, March 27, 2008.

Docket Numbers: ER08–646–000.

Applicants: Northeast Utilities Service Company.

Description: Northeast Utilities Service Company submits a Notice of Cancellation cancelling a Service Agreement for long-term firm transmission service dated 12/23/93 and a Service Agreement for long-term non-firm transmission service dated 8/22/94 etc.

Filed Date: 03/07/2008.

Accession Number: 20080310–0183.

Comment Date: 5 p.m. Eastern Time on Friday, March 28, 2008.

Docket Numbers: ER08–647–000.

Applicants: Entergy Services, Inc.

Description: Entergy Louisiana, LLC *et al.* submits an executed Transmission Assets Maintenance and Emergency Service Agreement.

Filed Date: 03/07/2008.

Accession Number: 20080311–0162.

Comment Date: 5 p.m. Eastern Time on Friday, March 28, 2008.

Docket Numbers: ER08–648–000.

Applicants: Alpha Energy Master, Ltd.

Description: Alpha Energy Master, Ltd submits Notice of Cancellation for Market Based Rate Authority and Schedule *et al.*

Filed Date: 03/07/2008.

Accession Number: 20080311–0161.

Comment Date: 5 p.m. Eastern Time on Friday, March 28, 2008

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES08–33–000.

Applicants: North Western Corporation.

Description: Application of NorthWestern Corporation and Authorization to Issue Securities and Request for Shortened Comment Period re NorthWestern Corporation.

Filed Date: 03/06/2008.

Accession Number: 20080310–0187.

Comment Date: 5 p.m. Eastern Time on Thursday, March 27, 2008.

Docket Numbers: ES08–34–000.

Applicants: Detroit Edison Company.

Description: Application of the Detroit Edison Company for authorization to issue securities and request for exemption from competitive bidding requirements.

Filed Date: 03/11/2008.

Accession Number: 20080311–5007.

Comment Date: 5 p.m. Eastern Time on Tuesday, April 01, 2008.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA07–48–001.

Applicants: Tucson Electric Power Company.

Description: Tuscson Electric Power Company submits revised Open Access Transmission Tariff Sheets designated as First Revised Sheet 20 *et al.* to FERC Electric Tariff, Fourth Revised Volume 2, effective 7/13/07.

Filed Date: 03/07/2008.

Accession Number: 20080311–0154.

Comment Date: 5 p.m. Eastern Time on Friday, March 28, 2008.

Docket Numbers: OA07–49–001.

Applicants: UNS Electric, Inc.

Description: UNS Electric Inc submits First Revised Sheet 21 *et al.* to FERC Electric Tariff, First Revised Volume 1, effective 7/13/07.

Filed Date: 03/07/2008.

Accession Number: 20080311–0153.

Comment Date: 5 p.m. Eastern Time on Friday, March 28, 2008.

Docket Numbers: OA07–102–000.

Applicants: Mid-Continent Area Power Pool.

Description: Order No. 890 Attachment C Compliance Filing of Mid-Continent Area Power Pool.

Filed Date: 03/10/2008.

Accession Number: 20080310–5089.

Comment Date: 5 p.m. Eastern Time on Monday, March 31, 2008.

Take notice that the Commission received the following PURPA 210(m)(3) filings:

Docket Numbers: QM08–4–000.

Applicants: Virginia Electric and Power Company.

Description: Application of Virginia Electric and Power Company for relief from the Mandatory Purchase Obligation of Section 292.303(a).

Filed Date: 03/10/2008.

Accession Number: 20080311–5013.

Comment Date: 5 p.m. Eastern Time on Monday, April 07, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC.

There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–5374 Filed 3–17–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R01–OAR–2008–0107; A–1–FRL–8543–3]

Adequacy Status of the Massachusetts 8-Hour Ozone Motor Vehicle Emissions Budgets for Transportation Conformity Purposes; Massachusetts

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of adequacy.

SUMMARY: EPA is notifying the public that EPA has found that the 2008 and 2009 motor vehicle emissions budgets in the January 31, 2008 Massachusetts 8-hour ozone State Implementation Plan revision are adequate for transportation conformity purposes. The submittal includes 2008 and 2009 motor vehicle emission budgets for the Boston-Lawrence-Worcester (Eastern Massachusetts) and Springfield (Western Massachusetts) 8-hour ozone nonattainment areas. As a result of our finding, Massachusetts must use these motor vehicle emission budgets for future conformity determinations.

DATES: This finding is effective April 2, 2008.

FOR FURTHER INFORMATION CONTACT: Donald O. Cooke, Environmental Scientist, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, Suite 1100 (CAQ), Boston, MA 02114–2023, (617) 918–1668, *cooke.donald@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, whenever ''we,'' ''us'' or ''our'' is used, we mean EPA.

Today's action is simply an announcement of a finding that we have already made. EPA New England sent a letter to the Massachusetts Department of Environmental Protection on March 7, 2008, stating that the 2008 and 2009 motor vehicle emissions budgets (MVEBs) in the Boston-Lawrence-Worcester (Eastern Massachusetts) and Springfield (Western Massachusetts) 8-hour ozone nonattainment areas are adequate. Massachusetts submitted the budgets on January 31, 2008, as part of the 8-hour ozone attainment demonstration and reasonable further progress plan for Eastern and Western Massachusetts. This submittal was announced on EPA's conformity website, and received no comments. (See *http://www.epa.gov/otaq/stateresources/transconf/adequacy.htm.* Once there, click on ''What SIP submissions are currently under EPA adequacy review?'')

The 2008 and 2009 MVEBs, in tons per summer day (tpsd), for volatile organic compounds (VOC) and oxides of nitrogen (NO_X) for Eastern and Western Massachusetts, are as follows:

ADEQUATE MOTOR VEHICLE EMISSIONS BUDGETS

	Boston-Lawrence-Worcester (Eastern Massachusetts) Area		Springfield (Western Massachusetts) Area	
	VOC (tpsd)	NO_X (tpsd)	VOC (tpsd)	NO_X (tpsd)
Year 2008	68.30	191.30	11.80	31.30
Year 2009	63.50	174.96	10.73	27.73

Transportation conformity is required by section 176(c) of the Clean Air Act. EPA's conformity rule requires that transportation plans, programs, and projects conform to state air quality implementation plans and establishes the criteria and procedures for determining whether or not they do. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay

timely attainment of the national ambient air quality standards.

The criteria by which we determine whether a SIP's motor vehicle emissions budgets are adequate for conformity purposes are outlined in 40 CFR 93.118(e)(4). We have described our process for determining the adequacy of submitted SIP budgets in our July 1, 2004, preamble starting at 69 FR 40038, and we used the information in these resources while making our adequacy determination. Please note that an adequacy review is separate from EPA's completeness review, and it also should not be used to prejudge EPA's ultimate approval of the SIP. Even if we find a budget adequate, the SIP could later be disapproved.

Authority: 42 U.S.C. 7401–7671q.

Dated: March 10, 2008.

Robert W. Varney,

Regional Administrator, EPA New England.

[FR Doc. E8–5399 Filed 3–17–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8543–2]

Proposed Administrative cost Recovery Settlement under Section 122(h) of the Comprehensive Environmental Response Compensation and Liability Act, as amended, 42 U.S.C. 9622(h), Chemcentral Midwest Corporation, Kansas City, MO

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response Compensation and Liability Act, as amended (CERCLA), 42 U.S.C. 9622(i), notice is hereby given of a proposed administrative settlement with Chemcentral Midwest Corporation, Kansas City, Missouri, for recovery of past response costs concerning the Chemcentral Midwest corporation facility, located at 910 North Prospect, Kansas City, Missouri. The settlement requires Chemcentral Midwest Corporation to pay to the Hazardous Substance Superfund for costs incurred by the United States Environmental Protection Agency, Region 7, in response to the fire at the Chemcentral facility on February 7, 2007. The settlement requires Chemcentral to pay $150,713, to the Hazardous Substance Superfund. The settlement includes a covenant not to sue the settling party pursuant to Section 107(a) of CERCLA, 42 U.S.C. 9607(a). For thirty (30) days following the date of publication of this notice, EPA will receive written comments relating to the settlement. EPA will consider all comments and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. EPA's response to any comments received will be available for public inspection at the EPA Region 7 office located at 901 N. 5th Street, Kansas City, Kansas.

DATES: Comments must be submitted on or before April 17, 2008.

ADDRESSES: The proposed settlement is available for public inspection at the EPA Region 7 office, 901 N. 5th Street, Kansas City, Kansas, Monday through Friday, between the hours of 7 a.m. through 5 p.m . A copy of the proposed settlement may be obtained from the Regional Hearing Clerk, 901 N. 5th Street, Kansas City, Kansas, (913) 551–7567. Requests should reference the Chemcentral Midwest Corporation, EPA Docket No. CERCLA–07–2008–0008. Comments should be addressed to: Julie M. Van Horn, Senior Assistant Regional Counsel, 901 N. 5th Street, Kansas City, Kansas 66101.

FOR FURTHER INFORMATION CONTACT: Julie M. Van Horn, at telephone: (913) 551–7889; fax number: (913) 551–7925/Attn: Julie M. Van Horn; E-mail address: *vanhorn.julie@epa.gov.*

Dated: March 5, 2008.

Cecilia Tapia,

Director, Superfund Division, Region 7.

[FR Doc. 08–1040 Filed 3–17–08; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

March 12, 2008.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to comment on the following information collection(s). Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before May 19, 2008. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Submit your comments by e-mail to *PRA@fcc.gov*. Include in the e-mail the OMB control number of the collection or, if there is no OMB control number, the Title shown in the **SUPPLEMENTARY INFORMATION** section below. If you are unable to submit your comments by e-mail contact the person listed below to make alternate arrangements.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s) or to obtain a copy of the collection send an e-mail to *PRA@fcc.gov* and include the collection's OMB control number as shown in the **SUPPLEMENTARY INFORMATION** section below (or the title of the collection if there is no OMB control number), or call Leslie F. Smith at (202) 418–0217.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0734.

Title: Sections 53,209, 53.211 and 53.213—Accounting Safeguards; Sections 271–276 of the Communications Act of 1934, as amended.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for-profit.

Number of Respondents and Responses: 45 respondents; 240 responses.

Estimated Time per Response: 72–19,200 hours.

Obligation to Respond: Required to obtain or retain a benefit. *See* Section 272(f)(1) Sunset of the BOC Separate

Affiliate and Related Requirements, *et al.*, WC Docket No. 02–112, 22 FCC Rcd 16440 (2007).

Frequency of Response: On occasion and biennial reporting requirements; third party disclosure requirement; and recordkeeping requirement.

Total Annual Burden: 265,581 hours.

Total Annual Cost: $1,500,000.

Privacy Act Impact Assessment: No impacts.

Nature and Extent of Confidentiality: The Commission is not requesting that the respondents submit confidential information to the FCC. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR Section 0.459 of the Commission's rules.

Needs and Uses: A Bell Operating Company (BOC) may choose from among three regulatory regimes in its provision of in-region, interstate, interLATA (Local Access and Transport Area) telecommunications services. One of these regimes is the regime set forth in section 272 of the Communications Act and the Commission's implementing rules, 47 CFR section 272. Under this regime, a BOC and its section 272 affiliate may not jointly own transmission and switching equipment. The separate section 272 affiliate must maintain separate books of account and have separate officers and directors. The separate section 272 affiliate may not obtain credit under arrangements that would permit the creditor to look to the assets of the BOC. The section 272 affiliate must conduct all transactions with the BOC on an arm's length basis, pursuant to the Commission's affiliate transaction rules, with the terms and conditions of such transactions reduced to writing and available for public inspection on the Internet. Section 272(d) states that companies required to maintain a separate affiliate ''shall obtain and pay for a Federal/State audit every two years conducted by an independent auditor to determine whether such company has complied with this section and the regulations promulgated under this section, and particularly whether such company has complied with the separate accounting requirements under [section 272(b)].'' These information collection requirements are intended to prevent discrimination, cost misallocation and other anti-competitive conduct by the BOCs.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–5407 Filed 3–17–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 2854]

Petition for Reconsideration of Action in Rulemaking Proceeding

March 5, 2008.

A Petition for Reconsideration has been filed in the Commission's Rulemaking proceeding listed in this Public Notice and published pursuant to 47 CFR Section 1.429(e). The full text of this document is available for viewing and copying in Room CY–B402, 445 12th Street, SW., Washington, DC or may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI) (1–800–378–3160). Oppositions to this petition must be filed by April 2, 2008. See Section 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions have expired.

Subject: In the Matter of Amendment of Parts 13 and 80 of the Commission's Rules Concerning Maritime Communications (WT Docket No. 00–48).

Number of Petitions Filed: 1.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–5405 Filed 3–17–08; 8:45 am]

BILLING CODE 6712–01–P

GENERAL SERVICES ADMINISTRATION

[FMR Bulletin PBS–2008–B5]

Federal Management Regulation; Redesignations of Federal Buildings

AGENCY: Public Buildings Service (P), GSA.

ACTION: Notice of a bulletin.

SUMMARY: The attached bulletin announces the redesignations of three Federal buildings.

Expiration Date: This bulletin expires August 1, 2008. However, the building redesignations announced by this bulletin will remain in effect until canceled or superseded.

FOR FURTHER INFORMATION CONTACT: General Services Administration, Public Buildings Service (P), Attn: Anthony E. Costa, 1800 F Street, NW., Washington, DC 20405, e-mail at *anthony.costa@gsa.gov.* (202) 501–1100.

Dated: March 4, 2008.

Lurita Doan,

Administrator of General Services.

To: Heads of Federal Agencies.

Subject: Redesignations of Federal Buildings.

1. *What is the purpose of this bulletin?* This bulletin announces the redesignations of three Federal buildings.

2. *When does this bulletin expire?* This bulletin expires August 1, 2008. However, the building redesignations announced by this bulletin will remain in effect until canceled or superseded.

3. *Redesignations.* The former and new names of the redesignated buildings are as follows:

Former name	New name
United States Courthouse, 301 North Miami Avenue, Miami, FL 33128	C. Clyde Atkins United States Courthouse, 301 North Miami Avenue, Miami, FL 33128.
Federal Building, 210 Walnut Street, Des Moines, IA 50309	Neal Smith Federal Building, 210 Walnut Street, Des Moines, IA 50309.
Federal Building and United States Courthouse, 100 East 8th Avenue, Pine Bluff, AR 71601.	George Howard, Jr. Federal Building and United States Courthouse, 100 East 8th Avenue, Pine Bluff, AR 71601.

4. *Who should we contact for further information regarding redesignation of these Federal Buildings?* U.S. General Services Administration, Public Buildings Service (P), Attn: Anthony E. Costa, 1800 F Street, NW., Washington, DC 20405, telephone number: (202) 501–1100, e-mail at *anthony.costa@gsa.gov.*

Dated: March 4, 2008.

Lurita Doan,

Administrator of General Services.

[FR Doc. E8–5395 Filed 3–17–08; 8:45 am]

BILLING CODE 6820–23–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Meeting

ACTION: Meeting announcement.

SUMMARY: This notice announces the meeting date for the 21st meeting of the American Health Information Community in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.) The American Health Information Community will advise the Secretary and recommend specific actions to achieve a common interoperability framework for health information technology (IT).

MEETING DATE: April 22, 2008, from 8:30 a.m. to 3 p.m. (Eastern).

ADDRESSES: Hubert H. Humphrey building (200 Independence Avenue, SW., Washington, DC 20201), Conference Room 800.

SUPPLEMENTARY INFORMATION: The meeting will include Workgroup presentations on Recommendations to the Community; a discussion on Priorities and Use Case Options and an update on the AHIC Successor.

FOR FURTHER INFORMATION CONTACT: visit *http://www.hhs.gov/healthit/ahic.html.* A Web cast of the Community meeting will be available on the NIH website at: *http://www.videocast.nih.gov/.*

If you have special needs for the meeting, please contact (202) 690–7151.

Dated: March 7, 2008.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. E8–5154 Filed 3–17–08; 8:45 am]

BILLING CODE 4150–45–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Quality Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 17th meeting of the American Health Information Community Quality Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.).

DATES: April 30, 2008, from 1 p.m. to 4 p.m. (Eastern).

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090 (please bring photo ID for entry to a Federal building).

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/quality/.*

SUPPLEMENTARY INFORMATION: The Workgroup will continue its discussion on how health information technology can provide the data needed for the development of quality measures that are useful to patients and others in the health care industry, automate the measurement and reporting of a comprehensive current and future set of quality measures, and accelerate the use of clinical decision support that can improve performance on those quality measures.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/quality/quality_instruct.html.*

Dated: March 6, 2008.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. E8–5157 Filed 3–17–08; 8:45 am]

BILLING CODE 4150–45–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Electronic Health Records Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 22nd meeting of the American Health Information Community Electronic Health Records Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.)

DATES: April 29, 2008, from 1 p.m. to 4 p.m. (Eastern).

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090. Please bring photo ID for entry to a Federal building.

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/healthrecords/*

SUPPLEMENTARY INFORMATION: The Workgroup will continue its discussion on ways to achieve widespread adoption of certified EHRs, minimizing gaps in adoption among providers.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/healthrecords/ehr_instruct.html.*

Dated: March 6, 2008.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. E8–5158 Filed 3–17–08; 8:45 am]

BILLING CODE 4150–45–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Consumer Empowerment Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 25th meeting of the American Health Information Community Consumer Empowerment Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.)

DATES: April 15, 2008, from 1 p.m. to 4 p.m. (Eastern).

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090. Please bring photo ID for entry to a Federal building.

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/consumer/.*

SUPPLEMENTARY INFORMATION: The Workgroup will continue its discussion on how to encourage the widespread adoption of a personal health record that is easy to use, portable, longitudinal, affordable, and consumer-centered.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/consumer/ce_instruct.html.*

Dated: March 6, 2008.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. E8–5159 Filed 3–17–08; 8:45 am]

BILLING CODE 4150–45–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Chronic Care Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 24th meeting of the American Health Information Community Chronic Care Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.)

DATES: April 9, 2008, from 1 p.m. to 4 p.m., Eastern Time.

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090. Please bring photo ID for entry to a Federal building.

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/chroniccare/*

SUPPLEMENTARY INFORMATION: The workgroup will hear testimony on ways to use information technology to better coordinate care for patients with chronic conditions and will discuss this information in light of opportunities to better facilitate patient care coordination.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/chroniccare/cc-instruct.html.*

Dated: March 6, 2008.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. E8–5160 Filed 3–17–08; 8:45 am]

BILLING CODE 4150–45–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Personalized Healthcare Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 14th meeting of the American Health Information Community Personalized Healthcare Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.).

DATES: April 7, 2008, from 1 p.m. to 4 p.m. [Eastern Time].

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090. Please bring photo ID for entry to a Federal building.

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/healthcare/*

SUPPLEMENTARY INFORMATION: The Workgroup will discuss possible common data standards to incorporate interoperable, clinically useful genetic/genomic information and analytical tools into Electronic Health Records (EHRs) to support clinical decision-making for the clinician and consumer.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/healthcare/phc_instruct.html.*

Dated: March 6, 2008.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. E8–5161 Filed 3–17–08; 8:45 am]

BILLING CODE 4150–45–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Population Health and Clinical Care Connections Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 25th meeting of the American Health Information Community Population Health and Clinical Care Connections Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.)

DATES: April 3, 2008, from 1 p.m. to 4 p.m. (Eastern Time).

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090 (please bring photo ID for entry to a Federal building).

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/population/.*

SUPPLEMENTARY INFORMATION: The Workgroup will continue its discussion on how to facilitate the flow of reliable health information among population health and clinical care systems necessary to protect and improve the public's health.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/population/pop_instruct.html.*

Dated: March 6, 2008.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. E8–5162 Filed 3–17–08; 8:45 am]

BILLING CODE 4150–45–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): National Institute for Occupational Safety and Health (NIOSH): Occupational Safety and Health Training Project Grants Announcement for Research (PAR) 06–484

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting.

Time and Date: 1 p.m.–3:30 p.m., April 1, 2008 (Closed).

Place: NIOSH, 2400 Century Parkway, Conference Room 4211–NIOSH–2, Atlanta, GA 30345.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters to be Discussed: The meeting will include the review, discussion, and evaluation of ''NIOSH Occupational Safety and Health Training Project Grants, PAR 06–484.''

Contact Person for More Information: Charles N. Rafferty, Ph.D., Assistant Director for Review and Policy Office of Extramural Program, Office of Extramural Coordination and Special Projects, NIOSH, CDC, 2400 Century Parkway, NE., Atlanta, GA 30345, Telephone (404) 498–2500.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: March 12, 2008.

Diane Allen,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E8–5376 Filed 3–17–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0157 (formerly 2007N–0105)]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Mental Models Study of Food Terrorism Risk Awareness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Mental Models Study of Food Terrorism Risk Awareness'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of the Chief Information Officer (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of July 24, 2007 (72 FR 40309), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0618. The approval expires on February 28, 2011. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain*.

Dated: March 10, 2008.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E8–5361 Filed 3–17–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0162]

Agency Information Collection Activities; Proposed Collection; Comment Request; Prescription Drug Product Labeling: Medication Guide Requirements

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on regulations requiring the distribution of patient labeling, called Medications Guides, for certain products that pose a serious and significant public health concern requiring distribution of FDA-approved patient medication.

DATES: Submit written or electronic comments on the collection of information by May 19, 2008.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos, Office of the Chief Information Officer (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1482.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumption used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Prescription Drug Product Labeling: Medication Guide Requirements (OMB Control Number 0910–0393)—Extension

FDA regulations require the distribution of patient labeling, called Medication Guides, for certain prescription human drug and biological products used primarily on an outpatient basis that pose a serious and significant public health concern requiring distribution of FDA-approved patient medication information. These Medication Guides inform patients about the most important information they should know about these products in order to use them safely and effectively. Included is information such as the drug's approved uses, contraindications, adverse drug reactions, and cautions for specific populations, with a focus on why the particular product requires a Medication Guide. These regulations are intended to improve the public health by providing information necessary for patients to use certain medications safely and effectively.

The regulations contain the following reporting requirements that are subject to the PRA. The estimates for the burden hours imposed by the following regulations are listed in table 1 of this document:

- 21 CFR 208.20—Applicants must submit draft Medication Guides for FDA

approval according to the prescribed content and format.

• 21 CFR 208.24(e)—Each authorized dispenser of a prescription drug product for which a Medication Guide is required, when dispensing the product to a patient or to a patient's agent, must provide a Medication Guide directly to each patient unless an exemption applies under § 208.26 (21 CFR 208.26).

• Section 208.26(a)—Requests may be submitted for exemption or deferral from particular Medication Guide content or format requirements.

• 21 CFR 314.70(b)(3)(ii) and 21 CFR 601.12(f)—Application holders must submit changes to Medication Guides to FDA for prior approval as supplements to their applications.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours Per Response	Total Hours
208.20	10	1	10	320	3,200
208.24(e)	59,000	5,000	295 million	.0014	413,000
208.26(a)	1	1	1	4	4
314.70(b)(3)(ii) and 601.12(f)	5	1	5	72	360
Total					416,564

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA through FDMS only.

Dated: March 11, 2008.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E8–5384 Filed 3–17–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2007F–0478]

Kemira Oyj; Filing of Food Additive Petition (Animal Use); Partially Ammoniated Formic Acid; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a document announcing the filing of a food additive petition that appeared in the **Federal Register** of January 11, 2008. FDA is correcting the name of the petitioner which was misspelled during document drafting.

DATES: This correction is effective March 18, 2008.

FOR FURTHER INFORMATION CONTACT: George K. Haibel, Center for Veterinary Medicine (HFV–6), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–267–9019, e-mail: *george.haibel@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In FR Doc. E8–316, published on January 11, 2008 (73 FR 2055), the following correction is made:

On page 2055, in the second column, in the **SUMMARY** and **SUPPLEMENTARY INFORMATION** sections, ''Oyi'' is corrected to read ''Oyj''.

Dated: March 7, 2008.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. E8–5453 Filed 3–17–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Meeting of the Advisory Committee on Organ Transplantation

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice of Meeting of the Advisory Committee on Organ Transplantation.

SUMMARY: Pursuant to Public Law 92–463, the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the fourteenth meeting of the Advisory Committee on Organ Transplantation (ACOT), Department of Health and Human Services (HHS). The meeting will be held from approximately 9 a.m. to 5:30 p.m. on May 5, 2008, and from 9 a.m. to 3 p.m. on May 6, 2008, at the Hilton Washington D.C./Rockville Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852. The meeting will be open to the public; however, seating is limited and pre-registration is encouraged (see below).

SUPPLEMENTARY INFORMATION: Under the authority of 42 U.S.C. Section 217a, Section 222 of the Public Health Service Act, as amended, and 42 CFR 121.12 (2000), ACOT was established to assist the Secretary in enhancing organ donation, ensuring that the system of organ transplantation is grounded in the best available medical science, and assuring the public that the system is as effective and equitable as possible, and, thereby, increasing public confidence in the integrity and effectiveness of the transplantation system. ACOT is composed of up to 25 members, including the Chair. Members are serving as Special Government Employees and have diverse backgrounds in fields such as organ donation, health care public policy, transplantation medicine and surgery, critical care medicine and other medical specialties involved in the identification and referral of donors, non-physician transplant professions, nursing, epidemiology, immunology, law and bioethics, behavioral sciences, economics and statistics, as well as representatives of transplant candidates, transplant recipients, organ donors, and family members.

ACOT will hear presentations on the ''Kidney Disease Outcome Quality Initiative/Early Kidney Transplantation Conference'' held on March 19–20, 2007; adolescent/medication nonadherence/transitioning from pediatric-adolescent care to adult care; revised informed consent recommendation; recovery/allocation/transplantation practices outside the United States; and a final report on the economics of transplantation. The four ACOT work groups also will update the

full Committee on their deliberations on informed consent, sources of funding for additional data collection, reducing pediatric deaths on the waitlist, and xenotransplantation.

The draft meeting agenda will be available on April 21 on the Department's donation Web site at *http://www.organdonor.gov/acot.html*.

A registration form will be available on April 7 on the Department's donation Web site at *http://www.organdonor.gov/acot.html*. The completed registration form should be submitted by facsimile to Professional and Scientific Associates (PSA), the logistical support contractor for the meeting, at fax number (703) 234–1701. Individuals without access to the Internet who wish to register may call Amanda Madeline with PSA at (703) 234–1244. Registration can also be completed electronically at *http://www.psava.com/dot/acot2008/*. Individuals who plan to attend the meeting and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the ACOT Executive Secretary, Gregory Fant, Ph.D., in advance of the meeting. Dr. Fant may be reached by telephone at 301–443–8728, e-mail: *Gregory.Fant@hrsa.hhs.gov* or in writing at the address provided below. Management and support services for ACOT functions are provided by the Division of Transplantation, Healthcare Systems Bureau, Health Resources and Services Administration, 5600 Fishers Lane, Parklawn Building, Room 12C–06, Rockville, Maryland 20857; telephone number 301–443–7577.

After the presentations and ACOT discussions, members of the public will have an opportunity to provide comments. Because of the Committee's full agenda and the timeframe in which to cover the agenda topics, public comment will be limited. All public comments will be included in the record of the ACOT meeting.

Dated: March 12, 2008.

Elizabeth M. Duke,

Administrator.

[FR Doc. E8–5460 Filed 3–17–08; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Meeting of the Advisory Council on Blood Stem Cell Transplantation

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice of Meeting of the Advisory Council on Blood Stem Cell Transplantation.

SUMMARY: Pursuant to Public Law 92–463, the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the second meeting of the Advisory Council on Blood Stem Cell Transplantation (ACBSCT), Department of Health and Human Services (HHS). The meeting will be held from approximately 9 a.m. to 5:30 p.m. on April 28, 2008, and from 9 a.m. to 3 p.m. on April 29, 2008, at the Hilton Washington D.C./Rockville Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852. The meeting will be open to the public; however, seating is limited and pre-registration is encouraged (see below).

SUPPLEMENTARY INFORMATION: Pursuant to Public Law 109–129, 42 U.S.C. 274k (section 379 of the Public Health Service Act, as amended) the ACBSCT was established to advise the Secretary of HHS and the Administrator, HRSA, on matters related to the activities of the C.W. Bill Young Cell Transplantation Program (Program) and the National Cord Blood Inventory (NCBI) Program. ACBSCT is composed of up to 25 members, including the Chair, serving as Special Government Employees. The current membership includes representatives of marrow donor centers and marrow transplant centers; representatives of cord blood banks and participating birthing hospitals; recipients of a bone marrow transplant; recipients of a cord blood transplant; persons who require such transplants; family members of such a recipient or family members of a patient who has requested the assistance of the Program in searching for an unrelated donor of bone marrow or cord blood; persons with expertise in bone marrow and cord blood transplantation; persons with expertise in typing, matching, and transplant outcome data analysis; persons with expertise in the social sciences; basic scientists with expertise in the biology of adult stem cells; ethicists; hematology and transfusion medicine researchers with expertise in adult blood stem cells; persons with expertise in cord blood processing; and members of the general public.

The Council will hear reports from five of the ACBSCT Work Groups: Cord Blood Accreditation Organization and Recognition Process, Need for Public Funding for Required Data Documentation, Process for Access of Cord Blood Units for Research, Scientific Factors Necessary to Define a Cord Blood Unit as High Quality, and Program Confidentiality/Policies for Cord Blood Donors.

The draft meeting agenda will be available on April 15, 2008, on the HRSA's Program Web site at *http://bloodcell.transplant.hrsa.gov/ABOUT/Advisory_Council/index.html*.

A registration form will be available on April 1, 2008, on the HRSA's Program Web site at *http://bloodcell.transplant.hrsa.gov/ABOUT/Advisory_Council/index.html*. The completed registration form should be submitted by facsimile to Professional and Scientific Associates (PSA), the logistical support contractor for the meeting, at fax number (703) 234–1701. Registration can also be completed electronically at *https://www.team-psa.com/dot/2008/acbsct/*. Individuals without access to the Internet who wish to register may call Amanda Madeline with PSA at (703) 234–1244.

Individuals who plan to attend the meeting and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the ACBSCT Executive Secretary, Remy Aronoff, in advance of the meeting. Mr. Aronoff may be reached by telephone at 301–443–3264, e-mail: *Remy.Aronoff@hrsa.hhs.gov* or in writing at the address provided below. Management and support services for ACBSCT functions are provided by the Division of Transplantation, Healthcare Systems Bureau, Health Resources and Services Administration, 5600 Fishers Lane, Parklawn Building, Room 12C–06, Rockville, Maryland 20857; telephone number 301–443–7577.

After the presentations and Council discussions, members of the public will have an opportunity to provide comments. Because of the Council's full agenda and the timeframe in which to cover the agenda topics, public comment will be limited. All public comments will be included in the record of the ACBSCT meeting. Meeting summary notes will be made available on the HRSA's Program Web site at *http://bloodcell.transplant.hrsa.gov/ABOUT/Advisory_Council/index.html*.

Dated: March 12, 2008.

Elizabeth M. Duke,

Administrator.

[FR Doc. E8–5461 Filed 3–17–08; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Research Resources; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Center for Research Resources Special Emphasis Panel, March 26, 2008, 8 a.m. to March 26, 2008, 7 p.m., Hilton Washington/Rockville, Double Tree Name Changed, 1750 Rockville Pike, Rockville, MD, 20852, which was published in the **Federal Register** on February 1, 2008, 73 FRN 22, page 6190.

The meeting location is the Hilton Washington DC North/Gaithersburg, 620 Perry Parkway, Gaithersburg, Maryland 20877. The meeting is closed to the public.

Dated: March 11, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–5317 Filed 3–17–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Genetic Modification of Aged and Diseased Muscle

Date: May 2, 2008.

Time: 12 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2c212, Bethesda, MD 20814 (Telephone Conference Call).

Contact Person: Elaine Lewis, PhD, Scientific Review Administrator, Scientific Review Office, National Institute on Aging, Gateway Building, Suite 2C212, MSC–9205, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–402–7707, *elainelewis@nia.nih.gov*.

Name of Committee: National Institute on Aging Special Emphasis Panel,p; Newhouse NIA P01 Review.

Date: May 6, 2008.

Time: 10 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, Room 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814 (Telephone Conference Call).

Contact Person: Jon E. Rolf, Ph.D., Scientific Review Administrator, Scientific Review Office, National Institute On Aging, Bethesda, MD 20814, (301) 402–7703, *rolfj@nia.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: March 10, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–5205 Filed 3–17–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel Digestive Diseases and Nutrition Mentored Awards.

Date: April 2, 2008.

Time: 10:30 a.m. to 11:30 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Michele L. Barnard, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 753, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8898, *barnardm@extra.niddk.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing imitations imposed by the review and funding cycle.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel Ancillary Studies in the Natural History of Acute Kidney Injury.

Date: April 11, 2008.

Time: 8:30 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Lakshmanan Sankaran, PhD, Scientific Review Administrator Review Branch, DEA, NIDDK, National Institutes Of Health, Room 755, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7799, *ls38oz@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: March 10, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–5209 Filed 3–17–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Immunology of Primary HIV–1 Infection.

Date: April 10, 2008.
Time: 1 p.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge 6700, 6700B Rockledge Drive, Rm 3119, Bethesda, MD 20817 (Telephone Conference Call).
Contact Person: Ileana M. Ponce-Gonzalez, MD, MPH, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–451–3679, *ipgonzalez@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: March 10, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–5210 Filed 3–17–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute of General Medical Sciences Special Emphasis Panel, March 28, 2008, 8 a.m. to March 28, 2008, 5 p.m., Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD, 20814 which was published in the Federal Register on March 6, 2008, 73 FR 12184.

The meeting will be held on March 28, 2008 from 10 a.m. to 3 p.m. The meeting is closed to the public.

Dated: March 10, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–5218 Filed 3–17–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the Office of AIDS Research Advisory Council.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Office of AIDS Research Advisory Council.
Date: April 17, 2008.
Time: 9 a.m. to 5 p.m.
Agenda: Discussions will focus on Genetics of HIV Infection and Human Immunology: Leveraging Genetics and Genomics Resources for the Study of HIV/AIDS. An update on the OARAC Working Groups for Treatment and Prevention Guidelines.
Place: National Institutes of Health 5635 Fishers Lane, MSC 9310 Suite 4000 Rockville, MD 20852.
Contact Person: Christina Brackna, Coordinator, Program Planning and Analysis, Office of AIDS Research, Office of the Director, NIH 5635 Fishers Lane, MSC 9310, Suite 4000, Rockville, MD 20852, (301) 402–8655, *cm53v@nih.gov.*

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.nih.gov/od/oar/index.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: March 11, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–5318 Filed 3–17–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel Urology Small Business and Study Section Conflicts.
Date: April 2, 2008.
Time: 11 a.m. to 1 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Shirley Hilden, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4222, MSC 7814, Bethesda, MD 20892, (301) 435–1198, *hildens@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Hematopoiesis.
Date: April 3, 2008.
Time: 1 p.m. to 3 p.m.
Agenda: To review and evaluate grant applications
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Delia Tang, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4126, MSC 7802 Bethesda, MD 20892, 301–435–2506, *tangd@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Stem Cells, Progenitors and Signaling.
Date: April 3, 2008.
Time: 2 p.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Jonathan K. Ivins, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040A, MSC 7806, Bethesda, MD 20892, (301) 594–1245, *ivinsj@csr.nih.gov.*

Name of Committee: Oncological Sciences Integrated Review Group Clinical Oncology Study Section.

Date: May 19–20, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Sharon K. Gubanich, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6204, MSC 7804, Bethesda, MD 20892, (301) 435–1767, *gubanics@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group Macromolecular Structure and Function E Study Section.

Date: May 27–28, 2008.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: La Jolla Shores Hotel, 8110 Camino del Oro, La Jolla, CA 92037.

Contact Person: Nitsa Rosenzweig, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1102, MSC 7760, Bethesda, MD 20892, (301) 435–1747, *rosenzweign@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 10, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–5206 Filed 3–17–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Institutes of Health Peer Review Advisory Committee.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: National Institutes of Health Peer Review Advisory Committee.

Date: April 30, 2008.

Time: 8:30 a.m. to 5 p.m.

Agenda: Provide technical and scientific advice to the Director, National Institutes of Health (NIH), the Deputy Director for Extramural Research, NIH and the Director, Center for Scientific Review (CSR), on matters relating broadly to review procedures and policies for the evaluation of scientific and technical merit of applications for grants and awards.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Ballroom Level, Bethesda, MD 20814.

Contact Person: Cheryl A. Kitt, PhD, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3030, MSC 7776, Bethesda, MD 20892, 301–435–1112, *kittc@csr.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 10, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–5212 Filed 3–17–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Call for Nominations for the National Cancer Institute Director's Consumer Liaison Group

The National Cancer Institute (NCI), the Federal Government's primary agency for cancer research, is seeking nominations for up to six (6) new members of the NCI Director's Consumer Liaison Group (DCLG) who will be appointed in July 2008. The DCLG is a Federal chartered advisory committee of the NCI. It consists of 16 consumer advocates who are involved in cancer advocacy and who reflect the diversity among those whose lives are affected by cancer.

The mission of the DCLG is to advise, assist, consult with, and make recommendations to the NCI Director, from the perspective and viewpoint of cancer consumer advocates on a wide variety of issues, programs, and research priorities. The DCLG serves as a channel for consumer advocates to voice their views and concerns. Specifically, the DCLG members:

- Help develop and establish processes, mechanisms, and criteria for identifying appropriate consumer advocates to serve on a variety of program and policy advisory committees responsible for advancing the mission of the NCI.
- Serve as a primary forum for discussing issues and concerns and exchanging viewpoints that are important to the broad development of the NCI programmatic and research priorities.
- Establish and maintain strong collaborations between the NCI and the cancer advocacy community to reach common goals.

Eligibility Requirements for Individual Members: To serve on the DCLG, a member must meet the following minimum eligibility requirements:

- Be involved in the cancer experience as a cancer survivor, a care-giver to someone who has cancer, or a professional or volunteer who works with survivors or those affected by cancer; and
- Represent a constituency with whom you communicate regularly on cancer issues and be able to serve as a conduit for information both to and from your constituency.

DCLG members must be committed to participate fully in all activities of the DCLG, including at least two meetings per year in the Bethesda, MD area, conference calls, and working group activities.

Criteria for Evaluating Individual Candidates: Nominees who meet the minimum eligibility requirements will be further assessed based on the following criteria:

- Cancer advocacy experience;
- Possession of strong leadership skills;
- Communication and collaboration skills;
- Ability to represent/advise on broad, cross-cutting cancer issues, including those NCI priorities identified by the NCI Director;
- Ability to facilitate dialogue between NCI and the cancer advocacy community.

Characteristics of the DCLG: In addition to the criteria for individual candidates, the following characteristics of the DCLG as a group are intended to ensure that it reflects the breadth and diversity of the consumer advocacy community:

- Ethnic and cultural diversity;
- A broad mix of cancer sites;
- Representation of the medically underserved;
- A range of cancer advocacy organizations (from small, local to regional and national);
- A diversity of ages and gender;
- Geographic diversity (including urban/rural areas).

Selection Process: A call for nominations is disseminated annually to a broad range of local, regional, and national organizations to encourage the nomination of candidates reflecting the diversity sought for the DCLG. All nominees are screened for eligibility and then according to criteria for evaluating individual candidates. A list of highly qualified candidates who reflect balance and diversity of representation is forwarded to the NCI Director, who selects the DCLG members.

NCI encourages nomination of candidates reflecting the diversity of the cancer advocacy community. Nominations can be made by organizations, including local/regional and national groups, or individuals, including self-nominations. In order to be considered for the DCLG, send a resume or curriculum vitae, two references and a cover letter detailing your interest in participating in the DCLG. Please be sure to include your advocacy or voluntary organization affiliation, address, phone number, and email address. Send the information to: DCLG 2008 Member Nomination, c/o Ms. Barbara Guest, Executive Secretary, Office of Advocacy Relations, National Cancer Institute, 31 Center Drive, Building 31, Room 10A28, Bethesda, MD 20892–2580, *guestb@mail.nih.gov,* Phone Number: 301–496–0307, Fax: 301–480–7558.

Nominations must be postmarked by April 15, 2008.

Dated: March 10, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–5213 Filed 3–17–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5191–N–05]

Notice of Proposed Information Collection: Comment Request; Disposition of HUD-Owned Single Family Assets in Asset Control Areas

AGENCY: Office of the Assistant Secretary for Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: May 19, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; e-mail *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048.

FOR FURTHER INFORMATION CONTACT: Vance T. Morris, Director, Office of Single Family Program Development, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–2121 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Single Family Housing—Disposition of HUD-Owned Single Family Assets in Asset Control Areas.

OMB Control Number, if applicable: 2502–NEW.

Description of the need for the information and proposed use:

The proposed rule would promulgate regulations for HUD's ''Asset Control Areas'' (ACA) program. The ACA program permits the sale of HUD-held single-family homes and mortgage assets available for sale at a discount to units of general local government, states, Indian tribes, nonprofit organizations and for-profit entities to provide homeownership opportunities and to promote neighborhood revitalization.

The information requested is required for the administration and oversight of the ACA program. Specifically, HUD will be able to ascertain whether ACA participants are adhering to eligible purchaser, rehabilitation, resale price, etc. requirements imposed by HUD as a condition of receiving ACA properties at a discount.

Agency form numbers, if applicable: None.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 2,091. The number of respondents is 18, the total number of annual responses is 360, the frequency of response is on occasion, and the average burden hour per response is 6.

Status of the proposed information collection: This is a new collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: March 12, 2008.

Frank L. Davis,

General Deputy Assistant Secretary for Housing-Deputy Federal Housing Commissioner.

[FR Doc. E8–5366 Filed 3–17–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5187–N–12]

Alternative Housing Pilot Program Evaluation Baseline Survey

AGENCY: Office of the Chief Information Officer, HUD

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

HUD is conducting an evaluation of FEMA's Alternative Housing Pilot Program (AHPP). Due to the immediate need to improve the temporary housing situation for many victims of Hurricanes Katrina and Rita, FEMA is rapidly developing the alternative housing. In order to measure program effectiveness, the evaluation requires that we do a baseline evaluation of households before they receive a housing unit. Because it has taken longer than expected for FEMA's AHPP to be

implemented in some States, new households continue to join the program and so there is a need to continue the administration to the baseline survey beyond March 2007 when the original clearance expires.

DATES: *Comments Due Date:* April 17, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2528–0248) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L_Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Alternative Housing Pilot Program Evaluation Baseline Survey.

OMB Approval Number: 2528–0248.

Form Numbers: None.

Description of the Need for the Information and Its Proposed Use: HUD is conducting an evaluation of FEMA's Alternative Housing Pilot Program (AHPP). Due to the immediate need to improve the temporary housing situation for many victims of Hurricanes Katrina and Rita, FEMA is rapidly developing the alternative housing. In order to measure program effectiveness, the evaluation requires that we do a baseline evaluation of households before they receive a housing unit. Because it has taken longer than expected for FEMA's AHPP to be implemented in some States, new households continue to join the program and so there is a need to continue the administration to the baseline survey beyond March 2007 when the original clearance expires.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	10,000	1		0.416		4,167

Total Estimated Burden Hours: 4,167.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: March 12, 2008.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E8–5362 Filed 3–17–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5187–N–13]

Real Estate Settlement Procedures Act (RESPA) Website Complaint Questionnaire

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 et seq., and the implementing Regulation, codified at 24 CFR 3500, insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices. The RESPA Website Complaint Questionnaire will provide a common website for consumers and settlement service providers to assist in the enforcement of RESPA, and will create efficiencies in processing complaints.

DATES: *Comments Due Date: April 17, 2008.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–NEW) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L_Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate

automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Estate Settlement Procedures Act (RESPA) Website Complaint Questionnaire.

OMB Approval Number: 2502–NEW.

Form Numbers: HUD–1974.

Description of the Need for the Information and Its Proposed Use: The Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, and the implementing Regulation, codified at 24 CFR 3500, insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices. The RESPA Website Complaint Questionnaire will provide a common website for consumers and settlement service providers to assist in the enforcement of RESPA, and will create efficiencies in processing complaints.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	1,246	1.5		0.33		617

Total Estimated Burden Hours: 617.

Status: New Collection.

AUTHORITY: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: March 12, 2008.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E8–5435 Filed 3–17–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5187–N–11]

Request for Prepayment of Direct Loans on Section 202 and 202/8 Projects

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Request from owner to prepay a multifamily housing project mortgage financed under Section 202 with inclusion of FHA insurance guidelines.

DATES: *Comments Due Date:* April 17, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0554) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L_Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Request for Prepayment of Direct Loans on Section 202 and 202/8 Projects.

OMB Approval Number: 2502–0554.

Form Numbers: HUD–9808.

Description of the Need for the Information and Its Proposed Use:

Request from owner to prepay a multifamily housing project mortgage financed under Section 202 with inclusion of FHA insurance guidelines.

Frequency of Submission: On occasion, Other Reporting is voluntary based on the owner's decision to prepay the mortgage.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	280	1	....	2	....	560

Total Estimated Burden Hours: 560.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: March 12, 2008.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E8–5364 Filed 3–17–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R3–ES–2008–N0039; 30120–1113–0000–F6]

Endangered and Threatened Species Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of permit applications; request for comments.

SUMMARY: The following applicant has applied for a permit to conduct certain activities with endangered species.

DATES: We must receive any written comments on or before April 17, 2008.

ADDRESSES: Regional Director, Attn: Peter Fasbender, U.S. Fish and Wildlife Service, Ecological Services, 1 Federal Drive, Fort Snelling, MN 55111—4056; electronic mail, *permitsR3ES@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Peter Fasbender, (612) 713–5343.

SUPPLEMENTARY INFORMATION:

Endangered Species

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), with some exceptions, prohibits activities affecting endangered species unless authorized by a permit from the Service. Before issuing a permit, we invite public comment on it. Accordingly, we invite public comment on the following applicant's permit application for certain activities with endangered species authorized by section 10(a)(1)(A) of the Act and the regulations governing the taking of endangered species (50 CFR 17). Submit your written data, comments, or requests for copies of the complete applications to the address shown in **ADDRESSES**.

Permit Number: TE003379

Applicant: U.S. Army Corps of Engineers, St. Paul District, St. Paul, Minnesota.

The applicant requests a permit renewal to take Higgins' eye pearlymussel (*Lampsilis higginsi*) in Iowa, Minnesota, and Wisconsin. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE006012–4

Applicant: Steven Taylor, Champaign, Illinois.

The applicant requests a permit renewal to take Illinois cave amphipod (*Gammarus acherondytes*) in Illinois. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE08517

Applicant: Davey Resource Group, Kent, Ohio.

The applicant requests a permit renewal for take of Indiana bat (*Myotis sodalis*). The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE023664–17

Applicant: Environmental Solutions & Innovations, Cincinnati, Ohio.

The applicant requests a permit renewal to take listed bats, plants, and mussels. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE 023666–2

Applicant: Eric R. Britzke, Forrest City, Arkansas.

The applicant requests a permit renewal to take the Indiana bat (*Myotis sodalis*), gray bat (*Myotis grisescens*), Virginia big-eared bat (*Corynorhinus townsendii virginianus*), Ozark big-eared bat (*Corynorhinus townsendii ingens*), and Northern flying squirrel (*Glaucomys sabrinus*) throughout their ranges. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE 040881

Applicant: Timothy C. Carter, Muncie, Indiana.

The applicant requests his permit re-issued to take the Indiana bat (*Myotis sodalis*) and gray bat (*Myotis grisescens*) throughout Georgia, Illinois, Indiana, Iowa, Michigan, Missouri, Ohio and Wisconsin. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE101150

Applicant: Volk Field, Camp Douglas, Wisconsin.

The applicant requests a permit renewal to take (harass) the whooping crane (*Grus americana*) within the Volk Field National Guard Base in Juneau County. The harassment is to enhance survival of whooping cranes within Volk Field air space.

Permit Number: TE118259

Applicant: Civil and Environmental Consultants, Inc, Pittsburgh, Pennsylvania.

The applicant requests a permit renewal to take the Indiana bat (*Myotis sodalis*) and gray bat (*Myotis grisescens*) throughout their ranges. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE120231

Applicant: John Timpone, St. Louis, Missouri.

The applicant requests a permit renewal and amendment to take the Indiana bat (*Myotis sodalis*) throughout Arkansas, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Vermont, Virginia, and West Virginia. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE120256

Applicant: David Ewert, Lansing, Michigan.

The applicant requests a permit renewal to take the Kirtland's warbler (*Dendroica kirtlandii*) throughout its range. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE125546

Applicant: Smithsonian Institute, Washington, DC.

The applicant requests a permit amendment to take the Kirtland's warbler (*Dendroica kirtlandii*) throughout its range. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE127643

Applicant: U.S. Forest Service, Northern Research Station, Columbia, Missouri.

The applicant requests a permit renewal to take the Indiana bat (*Myotis sodalis*), gray bat (*Myotis grisescens*), and Ozark big-eared bat (*Corynorhinus townsendii ingens*) throughout Missouri. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE128304–5

Applicant: Stantec Consulting Services (Formerly R.D. Zande and Associates), Columbus, Ohio.

The applicant requests a permit renewal and minor amendment for take of Indiana bat (*Myotis sodalis*) throughout its range. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE130493

Applicant: Michael J. Harvey, Cookeville, Tennessee.

The applicant requests a permit renewal to take the Indiana bat (*Myotis sodalis*), gray bat (*Myotis grisescens*), Virginia big-eared bat (*Corynorhinus townsendii virginianus*), and Ozark big-eared bat (*Corynorhinus townsendii ingens*) throughout their ranges. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE131386

Applicant: Lewis Environmental Consulting (Formerly Mainstream Commercial Divers, Inc.), Murray, Kentucky.

The applicant requests a permit renewal to take listed mussel species throughout Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Mississippi, Missouri, Ohio, Pennsylvania, Tennessee, West Virginia, and Wisconsin. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE131911

Applicant: Shawnee National Forest, Harrisburg, Illinois.

The applicant requests a permit renewal to take Indiana bats (*Myotis sodalis*), and gray bats (*Myotis grisescens*) throughout U.S. Forest Service property in Illinois and Missouri. The applicant also requests the permit amended to take these species throughout U.S. Forest Service property in Ohio. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE133291

Applicant: Chicago Botanic Garden, Glencoe, Illinois.

The applicant requests a permit renewal to take Pitcher's thistle (*Cirsium pitcherii*) throughout Indiana and Michigan. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE135297

Applicant: Saint Louis Zoo, St. Louis, Missouri.

The applicant requests a permit renewal to take (collect) the American burying beetle (*Nicrophorus americanus*) in Missouri. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE163772

Applicant: Partners for Fish and Wildlife Program, U.S. Fish and Wildlife Service, Fort Snelling, Minnesota.

The applicant requests a permit to take the copperbelly water snake (*Nerodia erythrogaster neglecta*) during habitat conservation and management actions aimed at recovery of the species within Michigan, Indiana, and Ohio. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE164072

Applicant: M. Brent McClane, St. Louis, Missouri.

The applicant requests a permit renewal to take listed mussel species throughout Arkansas, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Ohio, Tennessee, West Virginia, and Wisconsin. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE174386

Applicant: Rod McClanahan, Anna, Illinois.

The applicant requests a permit to take Indiana bats (*Myotis sodalis*), and gray bats (*Myotis grisescens*) throughout their ranges. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE174388

Applicant: Metropolitan Park District of the Toledo Area, Toledo County, Ohio.

The applicant requests a permit to take the Karner blue butterfly (*Lycaeides melissa samuelis*) in Ohio. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE174547

Applicant: Stantec Consulting Services, Inc., Topshame, Maine.

The applicant requests a permit to take Indiana bats (*Myotis sodalis*) throughout its range. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE174564

Applicant: Michigan Natural Features Inventory, Lansing, Michigan.

The applicant requests a permit to take the Mitchell's satyr butterfly (*Neonympha mitchellii mitchellii*) in Michigan. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE175852

Applicant: Christopher A. Hamm, Lansing, Michigan.

The applicant requests a permit to take the Mitchell's satyr butterfly (*Neonympha mitchellii mitchellii*) in Michigan. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE175859

Applicant: Maria Bidart-Bouzat, Bowling Green State University, Bowling Green, Ohio.

The applicant requests a permit to take the Karner blue butterfly (*Lycaeides melissa samuelis*) in Michigan and Ohio. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE175862

Applicant: University of Illinois at Chicago, Chicago, Illinois.

The applicant requests a permit to take Pitcher's thistle (*Cirsium pitcherii*) in Indiana. The scientific research is aimed at enhancement of survival of the species in the wild.

Permit Number: TE840524

Applicant: Lynn Robbins, Missouri State University, Springfield, Missouri.

The applicant requests a permit renewal to take Indiana bats (*Myotis sodalis*), and gray bats (*Myotis grisescens*). The scientific research is aimed at enhancement of survival of the species in the wild.

Public Comments

We solicit public review and comments on these permit applications. Please refer to the respective permit number when you submit comments. Comments and materials we receive are available for public inspection, by appointment, during normal business hours at the address shown in the **ADDRESSES** section. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

National Environmental Policy Act (NEPA)

In compliance with NEPA (42 U.S.C. 4321 *et. seq.*), we have made an initial determination that the activities proposed by this permit are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: February 13, 2008.

Lynn Lewis,

Assistant Regional Director, Acting, Ecological Services, Region 3, Fort Snelling, Minnesota.

[FR Doc. E8–5377 Filed 3–17–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–920–1320–EL, WYW174407]

Notice of Competitive Coal Lease Sale, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Competitive Coal Lease Sale.

SUMMARY: Notice is hereby given that certain coal resources in the South Maysdorf Coal Tract described below in Campbell County, Wyoming, will be reoffered for competitive lease by sealed bid in accordance with the provisions of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 181 *et seq.*).

DATES: The lease sale reoffer will be held at 10 a.m., on Tuesday, April 22, 2008. Sealed bids must be submitted on or before 4 p.m., on Monday, April 21, 2008.

ADDRESSES: The lease sale will be held in the First Floor Conference Room (Room 107), of the Bureau of Land Management (BLM) Wyoming State Office, 5353 Yellowstone Road, P.O. Box 1828, Cheyenne, WY 82003. Sealed bids must be submitted to the Cashier, BLM Wyoming State Office, at the address given above.

FOR FURTHER INFORMATION CONTACT: Mavis Love, Land Law Examiner, or Robert Janssen, Coal Coordinator, at 307–775–6258, and 307–775–6206, respectively.

SUPPLEMENTARY INFORMATION: This coal lease sale is being held in response to a lease by application (LBA) filed by Cordero Mining Company, Gillette, Wyoming. The South Maysdorf Coal Tract was previously offered on November 28, 2007, and the one bid received at that sale was rejected because it did not meet the Bureau of Land Management's estimate of fair market value. The coal resource to be offered consists of all reserves recoverable by surface mining methods in the following-described lands located in central Campbell County approximately 3–4 miles east of State Highway 59, 6–11 miles south of Bishop Road, and adjacent to the western and southern lease boundary of the Cordero Rojo mine:

T. 46 N., R. 71 W., 6th P.M., Wyoming
Section 4: Lots 5 through 7, 10 through 15, 18 through 20;
Section 9: Lots 1 through 5;
Section 10: Lots 1 through 6;
Section 11: Lots 1 through 12;
T. 47 N., R. 71 W., 6th P.M., Wyoming
Section 21: Lots 1 through 3, 6 through 11, 14 through 16;
Section 28: Lots 1 through 3, 6 through 11, 14 through 16;
Section 33: Lots 1 through 3, 6 through 11, 14 through 16.

Containing 2,900.24 acres more or less.

The tract is adjacent to Federal and State of Wyoming leases to the east and north controlled by the Cordero Rojo Mine. It is adjacent to additional unleased Federal coal to the west and south. It is also adjacent to about 540 acres of private coal controlled by the Cordero Rojo Mine. All of the acreage offered has been determined to be suitable for mining except for the main line railroad right-of-way in the far southeast portion of the LBA. Features such as the county roads and pipelines can be moved to permit coal recovery. The Belle Fourche River crosses the LBA, but can be diverted to allow mining. In addition, numerous oil and/or gas wells have been drilled on the tract. The estimate of the bonus value of the coal lease will include consideration of the future production from these wells. An economic analysis of this future income stream will determine whether a well is bought out and plugged prior to mining or re-established after mining is completed. The surface estate of the tract is owned by Cordero Mining Company, Cordero Rojo, Inc., a private individual, and the United States.

The tract contains surface mineable coal reserves in the Wyodak seam currently being recovered in the adjacent, existing mine. On the LBA tract, the Wyodak seam is generally a single seam averaging about 60 feet thick. An area containing no coal trends east/west across portions of section 4 in the southern portion of the LBA. Also, the southern portion of the LBA may have a rider of approximately 5–7 feet thick, which splits off the main seam with interburden ranging from 4–25 feet thick. Overburden depths to the Wyodak seam range from 60–340 feet thick on the LBA.

The tract contains an estimated 288,082,000 tons of mineable coal. This estimate of mineable reserves includes the main Wyodak seam and rider mentioned above but does not include any tonnage from localized seams or splits containing less than 5 feet of coal. It does not include the adjacent State of Wyoming or private coal although these reserves are expected to be recovered in conjunction with the LBA. It also excludes coal within and along the railroad right of way as required by typical mining practices. The total mineable stripping ratio (BCY/Ton) of the coal is about 3.5:1. Potential bidders for the LBA should consider the recovery rate expected from thick seam and multiple seam mining.

The Maysdorf South LBA coal is ranked as subbituminous C. The overall average quality on an as-received basis is 8404 BTU/lb with about 0.29% sulfur. These quality averages place the coal reserves near the lower/middle of the range of coal quality currently being mined in the Wyoming portion of the Powder River Basin.

The tract will be leased to the qualified bidder of the highest cash amount provided that the high bid meets or exceeds the BLM's estimate of the fair market value of the tract. The minimum bid for the tract is $100 per acre or fraction thereof. No bid that is less than $100 per acre, or fraction thereof, will be considered. The bids should be sent by certified mail, return receipt requested, or be hand delivered. The Cashier will issue a receipt for each hand-delivered bid. Bids received after 4 p.m., on Monday, April 21, 2008, will not be considered. The minimum bid is not intended to represent fair market value. The fair market value of the tract will be determined by the Authorized Officer after the sale. The lease issued as a result of this offering will provide for payment of an annual rental of $3.00 per acre, or fraction thereof, and a royalty payment to the United States of 12.5 percent of the value of coal produced by strip or auger mining methods and 8 percent of the value of the coal produced by underground mining methods. The value of the coal will be determined in accordance with 30 CFR 206.250.

Bidding instructions for the tract offered and the terms and conditions of the proposed coal lease are available from the BLM Wyoming State Office at the addresses above. Case file documents, WYW174407, are available for inspection at the BLM Wyoming State Office.

Dated: March 6, 2008.

Larry Claypool,

Acting Deputy State Director, Minerals and Lands.

[FR Doc. E8–4891 Filed 3–17–08; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–670–08–1220–DO]

Notice of Intent To Prepare an Amendment to the California Desert Conservation Area Plan and Environmental Impact Statement for the Imperial Sand Dunes Recreation Area in Imperial County, CA

AGENCY: Bureau of Land Management, USDI.

ACTION: Notice of intent.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act of 1969 (NEPA), the Bureau of Land Management (BLM), California Desert District, El Centro Field Office, will prepare the Imperial Sand Dunes Recreation Area (ISDRA) Recreation Area Management Plan (RAMP). The management plan will amend the CDCA plan. The management plan is needed to replace the existing management plan (1987) which has become outdated as a result of the federal listing of and designation of critical habitat for Peirson's milk-vetch as a threatened species, designation of the North Algodones Dunes as wilderness, and substantial changes in visitor use. A 2006 Federal court order remanded a previous 2003 ISDRA RAMP to BLM for further consideration. The 2006 court order also vacated and remanded the previous U.S. Fish and Wildlife Service (FWS) critical habitat designation for the federally threatened Peirson's milk-vetch. On February 14, 2008, the FWS published a final rule revising critical habitat for the Peirson's milk-vetch.

DATES: The public is invited to submit comments on the scope of the plan amendment and EIS. Written comments must be postmarked by May 31, 2008. Three public meetings will be held in El Centro, California; San Diego, California; and Phoenix, Arizona. The time and place for these meetings will be published in the San Diego Union Tribune, Arizona Republic, Imperial Valley Press, and the Yuma Daily Sun at least 15 days prior to the meetings. BLM intends to complete the management plan under an accelerated schedule by fall 2009. This schedule will allow BLM to replace the temporary administrative closures of five areas in the ISDRA (**Federal Register**: November 16, 2000—Volume 65, Number 222) with a long term management plan prior to the beginning of the peak recreation use period in 2009–2010.

SUPPLEMENTARY INFORMATION: In 2000, the Center for Biological Diversity, and others (Center) filed for injunctive relief in U.S. District Court against BLM alleging that BLM was in violation of section 7 of the Endangered Species Act (ESA) by failing to formally consult with the FWS on the effects of adoption of the CDCA Plan, as amended, upon threatened and endangered species. In 2006 the court vacated and remanded BLM's 2005 Record of Decision (ROD) approving the 2003 ISDRA RAMP/Final EIS. The order and injunction: (1) Remanded the 2003 RAMP for further consideration by BLM; (2) vacated and remanded to the FWS portions of the Biological Opinion (BO) for the 2003 RAMP; and (3) required that BLM maintain the temporary vehicle closure of five areas to protect the Peirson's milk-vetch until such time as a new RAMP, final EIS, ROD, and BO are completed and filed with the court.

The ISDRA project area encompasses approximately 150,000 acres of public lands bounded to the west by the Old Coachella Canal, to the east by the Union Pacific Railroad, to the North by Mammoth Wash, and to the south by Interstate 8 and the California/Mexico border. The primary activities in the ISDRA include camping and off highway vehicle use. Issues addressed in the RAMP/EIS will include: wildlife and botany; cultural resources and paleontology; water resources; noise; land use; geology and soils; mineral resources; socioeconomics; hazardous materials and solid waste; public health; visual resources; and traffic and transportation.

The following Planning Criteria will be utilized during production of this document:

- The plan will be completed in compliance with FLPMA, NEPA, and all other relevant Federal law, Executive orders, and management policies of the BLM;
- The planning process will include an EIS that will comply with NEPA standards;
- The Plan will set forth a framework for managing recreational activities in order to maintain existing natural landscapes and to provide for the enjoyment and safety of the visiting public.
- Where existing planning decisions are still valid, those decisions may remain unchanged and be incorporated into the new RMP (or amendment);
- The plans will recognize valid existing rights; and
- Native American Tribal consultations will be conducted in accordance with policy and Tribal concerns will be given due consideration. The planning process will include the consideration of any impacts on Indian trust assets.
- Consultation with the SHPO will be conducted throughout the plan.
- Consultation with USFWS will be conducted throughout the plan.

The tentative project schedule is as follows:

—Draft plan amendment/draft EIS—February 2009.

—Proposed plan amendment/final EIS—July 2009.

—Record of Decision—October 2009.

Public participation will be especially important at several points during the analysis and planning process. The scoping process (40 CFR 1501.7) for this analysis will include identification of issues and viable alternatives as well as identification and notification of interested groups, individuals and agencies to determine level of participation and obtain additional information concerning issues to be addressed in the RAMP/EIS.

Comments, including names and addresses of respondents, will be available for public review at the El Centro Field Office during normal working hours (8 a.m. to 4:15 p.m. except holidays), and may be published as part of the EIS or other related documents. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations and businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be available for public inspection in their entirety. Relevant documents will be available for inspection at the El Centro Field Office during normal working hours. Some documents will also be posted on the BLM internet Web site.

ADDRESSES: Comments should be sent to Erin Dreyfuss, Planning and Environmental Coordinator, El Centro Field Office, California Desert District,

Bureau of Land Management, 1661 South 4th Street, El Centro, CA 92243.

For Further Information or to Submit Comments Contact: Erin Dreyfuss, Bureau of Land Management, 1661 South 4th Street, El Centro, CA 92243, (760) 337–4400.

Vicki L. Wood,

Field Manager, El Centro Field Office.

[FR Doc. E8–5368 Filed 3–17–08; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–010–1990–EX; 08–08807; TAS: 14X1109]

Notice of Intent To Prepare an Environmental Impact Statement for Newmont Mining Corporation's Amendment to the Genesis-Bluestar Plan of Operations, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In accordance with section 102(2)(c) of the National Environmental Policy Act of 1969 and 43 CFR 3809, the Bureau of Land Management (BLM), Elko District Office will prepare an Environmental Impact Statement (EIS) to analyze the environmental effects of a proposed amendment to Newmont Mining Corporation's Plan of Operations for Genesis-Bluestar, an open pit gold mine. The area of operations is located 20 miles north of Carlin, Nevada in Eureka County. The amendment proposes continued mining in an area that has been mined more or less continuously since the early 1990s.

DATES: This notice initiates the 30-day public scoping period. Within 30 days of the publication of this notice in the **Federal Register**, a public scoping meeting will be held at the BLM Elko District Office, 3900 East Idaho Street, Elko, Nevada, to familiarize interested publics with the project and to identify issues and concerns to be addressed in the EIS. The scoping meeting will be announced through the local news media, newsletters, and the BLM Web site at *http://www.nv.blm.gov* at least 15 days prior to the event. Any additional public meetings, if necessary, will be announced similarly. Comments on issues can also be submitted in writing to the address listed below and for 30 days after publication of this notice in the **Federal Register**. In addition to the ongoing public participation process, formal opportunities for public participation will be provided upon publication of the Draft EIS.

ADDRESSES: Comments may be submitted by any of the following methods:

—Fax: (775) 753–0255

—Mail: Attention Genesis-Bluestar Project EIS Manager, BLM Elko District Office, 3900 East Idaho Street, Elko, NV 89801

—E-mail: *kirk_laird@nv.blm.gov*

FOR FURTHER INFORMATION CONTACT: Kirk Laird, (775) 753–0272.

SUPPLEMENTARY INFORMATION: The proposed amendment would expand Newmont's existing mining operations by an additional 43 acres of new disturbance (24 acres of public land and 19 acres of private land) in an area heavily disturbed by mining. The project proposes to expand the Genesis and West Genesis open pits, develop the new Bluestar Ridge Pit; backfill the Beast, Bluestar, Genesis, and West Genesis open pits; expand the Section 36 and Section 5 Waste Rock Disposal Facilities; construct the necessary haul roads and access roads; process 60 million tons of gold-bearing ore; and continue employment and economic activity for the local area for 12 additional years.

Focal points for the EIS include: 1. analyze the cumulative impacts of mining and related actions along the Carlin Trend, including incorporation of the re-analysis of cumulative impacts for the Leeville Project and South Operations Area Project; 2. analyze any release of mercury that may be associated with processing the 60 million tons of ore; and 3. analyze the socio-economic impacts of twelve additional years of mining.

The BLM is asking the public for information on any issues, including cumulative impacts, relevant to this amendment. Comments, including names and street addresses of respondents, will be available for public review at the above address during regular business hours 7:30 a.m. to 4:30 p.m., Monday through Friday, except holidays, and may be published as part of the EIS. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so. We will not consider anonymous comments. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be available for public inspection in their entirety.

(Authority: 43 CFR 2809)

Dated: February 19, 2008.

Kenneth E. Miller,

Elko District Manager.

[FR Doc. E8–3578 Filed 3–17–08; 8:45 am]

BILLING CODE 4310–HC–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–986–987 (Review)]

Ferrovanadium From China and South Africa

AGENCY: United States International Trade Commission.

ACTION: Notice of Commission determination to conduct full five-year reviews concerning the antidumping duty orders on ferrovanadium from China and South Africa.

SUMMARY: The Commission hereby gives notice that it will proceed with full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) to determine whether revocation of the antidumping duty orders on ferrovanadium from China and South Africa would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. A schedule for the reviews will be established and announced at a later date. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

EFFECTIVE DATE: March 7, 2008.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://*

www.usitc.gov). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION: On March 7, 2008, the Commission determined that it should proceed to full reviews in the subject five-year reviews pursuant to section 751(c)(5) of the Act. The Commission found that the domestic interested party group response to its notice of institution (72 FR 67962, December 3, 2007) was adequate and that the respondent interested party group response was inadequate. The Commission also found that other circumstances warranted conducting full reviews. A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's Web site.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: March 12, 2008.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–5391 Filed 3–17–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–08–005]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: March 20, 2008 at 9 a.m.

PLACE: Room 101, 500 E Street, SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meetings: None.
2. Minutes.
3. Ratification List.
4. Inv. No. 731–TA–749 (Second Review) (Persulfates from China)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before March 31, 2008.)
5. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: March 12, 2008.

By order of the Commission.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. E8–5347 Filed 3–17–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1110 (Final)]

Sodium Hexametaphosphate From China

Determination

On the basis of the record [1] developed in the subject investigation, the United States International Trade Commission (Commission) determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the Act), that an industry in the United States is materially injured by reason of imports from China of sodium hexametaphosphate, provided for in subheadings 2835.39.50 and 3824.90.39 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce (Commerce) to be sold in the United States at less than fair value (LTFV).[2]

Background

The Commission instituted this investigation effective February 8, 2007, following receipt of a petition filed with the Commission and Commerce by ICL Performance Products, LP, St. Louis, MO, and Innophos, Inc., Cranbury, NJ. The final phase of the investigation was scheduled by the Commission following notification of a preliminary determination by Commerce that imports of sodium hexametaphosphate from China were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of October 31, 2007 (72 FR 61677). The hearing was held in Washington, DC, on January 24, 2008, and all persons who requested the opportunity were permitted to appear in person or by counsel.

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

[2] Commissioner Dean A. Pinkert did not participate in this investigation.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on March 12, 2008. The views of the Commission are contained in USITC Publication 3984 (March 2008), entitled *Sodium Hexametaphosphate from China: Investigation No. 731–TA–1110 (Final).*

By order of the Commission.

Issued: March 12, 2008.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–5392 Filed 3–17–08; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1103–NEW]

Office of Community Oriented Policing Services; Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Situational Policing Officer and Neighborhood Survey.

The Department of Justice (DOJ) Office of Community Oriented Policing Services (COPS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The revision of a currently approved information collection is published to obtain comments from the public and affected agencies.

The purpose of this notice is to allow for 30 days for public comment until April 17, 2008. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Rebekah Dorr, Department of Justice Office of Community Oriented Policing Services, 1100 Vermont Avenue, NW., Washington, DC 20530.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including

whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Proposed collection; comments requested.

(2) *Title of the Form/Collection:* Situational Policing Officer and Neighborhood Survey.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* None. U.S. Department of Justice Office of Community Oriented Policing Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* A small number of law enforcement officers and residents in the following jurisdictions: Pittsburgh, PA, Cleveland, OH, Akron, OH and Ohio County, WV.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that approximately 1,600 respondents for the neighborhood survey for an average of 15 minutes per response. It is estimated that approximately 200 respondents for the officer survey for an average of 10 minutes per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated burden is 433.5 hours.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: March 14, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, Department of Justice.

[FR Doc. E8–5382 Filed 3–17–08; 8:45 am]

BILLING CODE 4410–AT–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0003]

Office on Violence Against Women; Agency Information Collection Activities: Revision of a Currently Approved Collection

ACTION: 60-Day Notice of Information Collection Under Review: Annual Progress Report for the STOP Formula Grants Program.

The Department of Justice, Office on Violence Against Women (OVW) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. Comments are encouraged and will be accepted for ''sixty days'' until May 19, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Annual Progress Report for the STOP Violence Against Women Formula Grants Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122–0003. U.S. Department of Justice, Office on Violence Against Women (OVW).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the 56 STOP state administrators (from 50 states, the District of Columbia and five territories and commonwealths (Guam, Puerto Rico, American Samoa, Virgin Islands, Northern Mariana Islands)) and their subgrantees. The STOP Violence Against Women Formula Grants Program was authorized through the Violence Against Women Act of 1994 (VAWA) and reauthorized and amended by the Violence Against Women Act of 2000 (VAWA 2000) and by the Violence Against Women Act of 2005 (VAWA 2005). Its purpose is to promote a coordinated, multi-disciplinary approach to improving the criminal justice system's response to violence against women. The STOP Formula Grants Program envisions a partnership among law enforcement, prosecution, courts, and victim advocacy organizations to enhance victim safety and hold offenders accountable for their crimes of violence against women. OVW administers the STOP Formula Grants Program. The grant funds must be distributed by STOP state administrators to subgrantees according to a statutory formula (as amended by VAWA 2000 and by VAWA 2005).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the 56 respondents (STOP administrators) approximately one hour to complete an annual progress report. It is estimated that it will take approximately one hour for roughly 2500 subgrantees [1] to complete the relevant portion of the annual progress report. The Annual Progress Report for the STOP Formula Grants Program is divided into sections that pertain to the different types of activities that

[1] Each year the number of STOP subgrantees changes. The number 2,500 is based on the number of reports that OVW has received in the past from STOP subgrantees.

subgrantees may engage in and the different types of subgrantees that receive funds, i.e. law enforcement agencies, prosecutors' offices, courts, victim services agencies, etc.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the annual progress report is 2556 hours.

If additional information is required contact: Lynn Bryant, Deputy Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Suite 1600, Patrick Henry Building, 601 D Street NW., Washington, DC 20530.

Dated: March 13, 2008.

Lynn Bryant,

Department Clearance Officer, United States Department of Justice.

[FR Doc. E8–5410 Filed 3–17–08; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0007]

Office on Violence Against Women; Agency Information Collection Activities: Revision of a Currently Approved Collection

ACTION: 60-Day Notice of Information Collection Under Review: Semi-Annual Progress Report for the Legal Assistance for Victims Grant Program.

The Department of Justice, Office on Violence Against Women (OVW) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. Comments are encouraged and will be accepted for ''sixty days'' until May 19, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Semi-Annual Progress Report for Grantees of the Legal Assistance for Victims Grant Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122–0007. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the approximately 200 grantees of the Legal Assistance for Victims Grant Program (LAV Program) whose eligibility is determined by statute. In 1998, Congress appropriated funding to provide civil legal assistance to domestic violence victims through a set-aside under the Grants to Combat Violence Against Women, Public Law 105–277. In the Violence Against Women Act of 2000 and again in 2005, Congress statutorily authorized the LAV Program. 42 U.S.C. 3796gg–6. The LAV Program is intended to increase the availability of legal assistance necessary to provide effective aid to victims of domestic violence, stalking, or sexual assault who are seeking relief in legal matters arising as a consequence of that abuse or violence. The LAV Program awards grants to law school legal clinics, legal aid or legal services programs, domestic violence victims' shelters, bar associations, sexual assault programs, private nonprofit entities, and Indian tribal governments. These grants are for providing direct legal services to victims of domestic violence, sexual assault, and stalking in matters arising from the abuse or violence and for providing enhanced training for lawyers representing these victims. The goal of the Program is to develop innovative, collaborative projects that provide quality representation to victims of domestic violence, sexual assault, and stalking.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the approximately 200 respondents (LAV Program grantees) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities that grantees may engage in and the different types of grantees that receive funds. An LAV Program grantee will only be required to complete the sections of the form that pertain to its own specific activities.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the data collection forms is 400 hours, that is 200 grantees completing a form twice a year with an estimated completion time for the form being one hour.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Suite 1600, Patrick Henry Building, 601 D Street, NW., Washington, DC 20530.

Dated: March 13, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E8–5411 Filed 3–17–08; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0016]

Office on Violence Against Women; Agency Information Collection Activities: Revision of a Currently Approved Collection

ACTION: 60-Day Notice of Information Collection Under Review: Semi-Annual Progress Report for the Transitional Housing Assistance Grant Program.

The Department of Justice, Office on Violence Against Women (OVW) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. Comments are encouraged and will be

accepted for ''sixty days'' until May 19, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Semi-Annual Progress Report for Grantees of the Transitional Housing Assistance Grant Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122–0016. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the approximately 120 grantees of the Transitional Housing Assistance Grant Program (Transitional Housing Program) whose eligibility is determined by statute. This discretionary grant program provides transitional housing, short-term housing assistance, and related support services for individuals who are homeless, or in need of transitional housing or other housing assistance, as a result of fleeing a situation of domestic violence, dating violence, sexual assault, or stalking, and for whom emergency shelter services or other crisis intervention services are unavailable or insufficient. Eligible applicants are States, units of local government, Indian tribal governments, and other organizations, including domestic violence and sexual assault victim services providers, domestic violence or sexual assault coalitions, other nonprofit, nongovernmental organizations, or community-based and culturally specific organizations, that have a documented history of effective work concerning domestic violence, dating violence, sexual assault, or stalking.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the 120 respondents (grantees) approximately one hour to complete the Semi-Annual Progress Report. The semi-annual progress report is divided into sections that pertain to the different types of activities that grantees may engage in and the different types of grantees that receive funds. A Transitional Housing Program grantee will only be required to complete the sections of the form that pertain to its own specific activities.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the data collection forms is 240 hours, that is 120 grantees completing a form twice a year with an estimated completion time for the form being one hour.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Suite 1600, Patrick Henry Building, 601 D Street NW., Washington, DC 20530.

Dated: March 13, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E8–5412 Filed 3–17–08; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on March 11, 2008, a proposed Consent Decree in *United States* v. *City of Jacksonville, Florida*, Civil Action No. 308–CV–257 (J–20TEM), was lodged with the United States District Court for the Middle District of Florida, Jacksonville Division.

The Consent Decree represents the settlement of claims brought by the United States pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The complaint contained claims seeking injunctive relief and the recovery of costs incurred by the United States in connection with the release and threatened release of hazardous substances from facilities known as the Brown's Dump Site and the Jacksonville Ash Site, which are located within the City of Jacksonville.

For approximately fifty years, the City operated two incinerators and a landfill resulting in widespread contamination in and around Jacksonville. The sites are contaminated with incinerator ash, which contains metals, arsenic, polyaromatic hydrocarbons and dioxin, among other things.

The Jacksonville Ash site (JAS) includes three separate locations of former waste processing and/or disposal facilities operated or used by the City. The JAS consists of two former city incinerators at Forest Street and at 5th and Cleveland Streets, and a former dump site that is now occupied by the Lonnie C. Miller, Sr. Park. All three locations are in the northwest portion of Jacksonville in Duval County, Florida.

The Brown's Dump Site consists of the former Mary McLeod Bethune Elementary School, an electrical substation of the Jacksonville Electric Authority, surrounding single family homes and apartment buildings.

In August 2006, the U.S. Environmental Protection Agency selected cleanup plans for the two sites. The plans require soil excavation at residential properties, schools and parks, and the installation of a two-foot layer of clean soil. Excavated soil will be solidified and stabilized in accordance with federal regulations, as needed, prior to off-site disposal at an appropriate landfill. The plans will provide for various measures to protect

human health and the environment. Remediation will also be conducted at streams and creeks, and groundwater will be monitored to ensure protection of public health and the environment. In addition, the Consent Decree requires the City to reimburse the United States for costs incurred in connection with the Sites.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *City of Jacksonville, Florida*, D.J. Ref. 90–11–3–08080.

The Consent Decree may be examined at U.S. EPA Region 4, Atlanta Federal Center, 61 Forsyth Street, Atlanta, Georgia 30303. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html*. A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $12.25 (for the Consent Decree only and $175.50 for the Consent Decree and all exhibits thereto) (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Henry S. Friedman,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–5380 Filed 3–17–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Settlement Agreement Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

Notice is hereby given that on February 22, 2008, a proposed Settlement Agreement was filed with the United States Bankruptcy Court for the Southern District of Texas in *In re ASARCO LLC, et al.*, No. 05–21207 (Bankr. S.D. Tex.). The Settlement Agreement addresses the Barker Hughesville (Block P) Site in Cascade and Judith Basin Counties, Montana. Under the proposed settlement, the United States will have an allowed general unsecured claim of $1 million and the State of Montana will have an allowed general unsecured claim of $7.1 million.

For thirty (30) days after the date of this publication, the Department of Justice will receive comments relating to the Settlement Agreement. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to Environmental Enforcement Section, U.S. Department of Justice, P.O. Box. 7611, Washington, DC 20044–7611. In either case, comments should refer to *In re Asarco LLC*, No. 05–21207 (Bankr. S.D. Tex.), D.J. Ref. No. 90–11–3–08633. Commenters may request an opportunity for a public meeting in the affected area, in accordance with Section 7003(d) of RCRA, 42 U.S.C. 6973(d).

The proposed Settlement Agreement may be examined at the office of the United States Attorney for the Southern District of Texas, 800 North Shoreline Blvd, #500, Corpus Christi, TX 78476–2001, and at the Region 7 office of the United States Environmental Protection Agency, 901 North Fifth Street, Kansas City, KS 66101. During the comment period, the proposed Settlement Agreement may also be examined on the following Department of Justice website: *http://www.usdoj.gov/enrd/Consent_Decrees.html*. A copy of the proposed Settlement Agreement may also be obtained by mail from the Department of Justice Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy of the Settlement Agreement from the Consent Decree Library, please enclose a check in the amount of $3.25 (25 cents per page reproduction costs) payable to the United States Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Robert E. Maher, Jr.,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–5350 Filed 3–17–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Cookson Group PLC, et. al.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States* v. *Cookson Group* plc, *et. al.,* Civil Action No. 1:08–cv–00389. On March 4, 2008, the United States filed a Complaint to obtain equitable and other relief against defendants Cookson Group plc and Cookson America Inc. (''Cookson''), and Foseco plc and Foseco Metallurgical Inc. (''Foseco'') to prevent Cookson's proposed acquisition of Foseco. The Complaint alleges that Cookson's acquisition of Foseco's United States carbon-bonded ceramic refractory (''CBC'') business would substantially lessen competition in the United States in the development, manufacture, and sale of certain CBCs, in violation of section 7 of the Clayton Act, as amended, 15 U.S.C. 18. The proposed Final Judgment, filed on March 4, 2008, requires defendants to divest Foseco's entire United States CBC business, including its plant in Saybrook, Ohio and related assets.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 325 7th Street, NW., Room 215, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr*, and at the Office of the Clerk of the United States District Court for the District of Columbia, Washington, DC. Copies of these materials may be obtained from the Antitrust Division upon request and payment of a copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and Responses thereto, will be published in the **Federal Register**

and filed with the Court. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 1401 H Street, NW., Suite 3000, Washington, DC 20530 (telephone: 202–307–0924).

J. Robert Kramer II,

Director of Operations, Antitrust Division.

United States District Court for the District of Columbia

United States of America, Department of Justice, Antitrust Division, 1401 H Street, NW., Suite 3000, Washington, DC 20530, Plaintiff, v. Cookson Group, PLC, 165 Fleet Street, London EC4A 2AE, England; Cookson America, Inc., I Cookson Place, Providence, RI 02903–3248; FOSECO PLC, Coleshill Road, Fazeley, Tamworth, Staffordshire B78 3TL, England; and FOSECO Metallurgical Inc., 20200 Sheldon Road, Cleveland, OH 44142, Defendants; Civil Action No. 1:08–cv–00389; Judge: Urbina, Ricardo M.; Deck Type: Antitrust; Date Stamp: March 4, 2008

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action to enjoin the proposed acquisition by Cookson Group plc of Foseco plc and to obtain equitable and other relief. The United States complains and alleges as follows:

I. Nature of the Action

1. On October 11, 2007, Cookson and Foseco announced that they had reached agreement on the terms of a recommended cash offer by Cookson for the entire issued and to-be-issued share capital of Foseco in a transaction valued at approximately $1 billion.

2. Cookson and Foseco both manufacture and sell isostatically pressed carbon bonded ceramics products (''CBCs''), which are used to control the flow and enhance the quality of steel produced in the continuous casting steelmaking process. Cookson's proposed acquisition of Foseco would combine two of only three North American manufacturers of certain CBCs.

3. The United States brings this action to enjoin Cookson's proposed acquisition of Foseco because it would substantially lessen competition in the markets for certain CBCs in violation of section 7 of the Clayton Act, 15 U.S.C. 18.

II. Parties to the Proposed Acquisition

4. Cookson Group plc (''Cookson''), a United Kingdom corporation with its headquarters in London, England, is a manufacturer and processor of ceramics, electronics, and precious metals. Cookson's total 2006 worldwide revenues were approximately $3.3 billion, and its total 2006 U.S. revenues were about $356 million. Cookson America Inc., a wholly-owned subsidiary of Cookson Group plc, is a Delaware corporation with its headquarters in Providence, Rhode Island. Cookson, through its subsidiaries, manufactures CBCs in the United States and Mexico and distributes them throughout the United States. In 2006, Cookson's U.S. CBC revenues were about $75 million.

5. Foseco plc, a United Kingdom corporation with its headquarters in Staffordshire, England, manufactures refractories and related products for sale, and offers services worldwide to the steel and foundry industries. Its total 2006 worldwide revenues were approximately $817 million, and its total 2006 U.S. revenues were about $110 million. Foseco Metallurgical Inc., a wholly-owned subsidiary of Foseco plc, is a Delaware corporation with its headquarters in Cleveland, Ohio (together with Foseco plc, ''Foseco''). Foseco manufactures CBCs in the United States and distributes them throughout the United States. In 2006, Foseco's U.S. CBC revenues were about $4 million.

III. Jurisdiction and Venue

6. The United States brings this action under section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to prevent and restrain the Defendants from violating section 7 of the Clayton Act, 15 U.S.C. 18.

7. Defendants manufacture and sell CBCs in the flow of interstate commerce. Defendants' activities in manufacturing and selling these products substantially affect interstate commerce. This Court has subject matter jurisdiction over this action pursuant to section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1331, 1337(a), and 1345.

8. Defendants have consented to venue and personal jurisdiction in this judicial district and venue is proper under 28 U.S.C. 1391(d).

IV. Trade and Commerce

A. CBCs Generally

9. Refractories are non-metallic ceramics that serve as a heat buffer or lining in industrial devices because they withstand extremely high temperatures. In the steelmaking process, refractory products serve as barriers between hot molten steel and the non-consumable equipment such as the furnaces, ladles, and tundishes. A ladle is a large container that receives molten steel from a furnace; a tundish is a receptacle that receives steel from the ladle and to controls the flow of steel into molds during the continuous casting process.

10. CBCs are consumable, isostatically pressed refractory products that control the flow of molten steel from the ladle to the tundish and onto the continuous casting mold during the continuous casting process. CBCs are consumed through exposure to molten steel and must be replaced frequently.

11. Isostatic pressing is a process used in the manufacture of CBCs to increase the refractory materials' density and homogeneity, resulting in a CBC with increased thermal shock resistance and resistivity to chemical attack. Carbon-bonded alumina graphite is the main refractory material used to make CBCs.

12. The ''design'' of a CBC refers to both its shape and the alumina graphite recipe. Each customer uses different designs tailored to the equipment it uses in the casting process. Customers with multiple plants require custom-designed CBCs for each plant and may require multiple custom-designed CBCs within each plant. Designs depend on variables such as the customer's cast strand size and shape, casting speed, and the steel grades produced. Customers change CBC recipes and/or shapes in order to improve steel quality, meet new steel specifications, or save on CBC costs.

13. CBCs undergo rigorous testing by the manufacturer and the customer to ensure reliable performance and value under actual casting conditions. Because CBCs are critical to the steelmaking process, most customers have a policy of splitting sales between at least two suppliers to ensure supply.

B. The Relevant Product Markets

1. Ladle Shrouds

14. Ladle shrouds are CBCs that prevent molten steel from re-oxidizing and ensure the steel transfers safely from the ladle to the tundish.

15. There are no good substitutes for ladle shrouds. A small but significant post-acquisition increase in the price of ladle shrouds would not cause customers to substitute another product or otherwise reduce their usage of ladle shrouds in sufficient quantities so as to make such a price increase unprofitable.

16. The manufacture and sale of ladle shrouds is a line of commerce and a relevant product market within the meaning of section 7 of the Clayton Act.

2. Stopper Rods

17. Stopper rods are CBCs used to control the flow of steel out of the

tundish and are one of two types of devices, the other being slide gate systems, that can perform this function. Customers use only one device or the other in a given tundish. The choice of device depends on the design of the tundish. Once the choice of tundish design has been made, a customer cannot switch from a stopper rod to a slide gate system without also replacing or substantially reconfiguring the tundish-significantly disrupting their operations.

18. Because of high switching costs, a small but significant post-acquisition increase in the price of stopper rods would not cause customers to switch to slide gate systems or otherwise reduce their usage of stopper rods in sufficient quantities so as to make such a price increase unprofitable.

19. The manufacture and sale of stopper rods is a line of commerce and a relevant product market within the meaning of section 7 of the Clayton Act.

C. The Relevant Geographic Markets

20. Cookson and Foseco manufacture ladle shrouds and stopper rods at facilities in North America for sale in the United States.

21. Virtually all ladle shrouds and stopper rods purchased by customers in the United States are produced in plants located in North America. Although a few manufacturers outside of North America make ladle shrouds and stopper rods, firms with production facilities in North America have a significant advantage over these foreign manufacturers in delivered cost and/or in competing for customers that value shorter lead times in their supply chain.

22. A small but significant post-acquisition increase in the price of ladle shrouds and stopper rods would not cause customers in North America to switch to purchases from manufacturers outside of North America in sufficient numbers so as to make such a price increase unprofitable.

23. Accordingly, within the meaning of section 7 of the Clayton Act, the relevant geographic market for ladle shrouds and stopper rods is North America.

D. Anticompetitive Effects: The Proposed Transaction Will Harm Competition in the Markets for Ladle Shrouds and Stopper Rods

24. The production of ladle shrouds and stopper rods involves similar materials and manufacturing processes. In general, manufacturers that are successful in selling ladle shrouds to U.S. customers are also successful in selling stopper rods to U.S. customers, and vice versa.

25. Cookson and Foseco are two of only three firms that manufacture and sell the vast majority of ladle shrouds and stopper rods to U.S. customers. Cookson and Foseco have competed with one another on price, service, and innovation in the markets for stopper rods and ladle shrouds. The markets for ladle shrouds and stopper rods would become substantially more concentrated if Cookson acquires Foseco. Cookson and Foseco would have a combined share of approximately 75 percent. Using a measure of market concentration called the Herfindahl-Hirschman Index (''HHI'') (defined and explained in Appendix A), the proposed transaction would increase the HHI in both markets by approximately 700 points to a post-transaction level in excess of 6000.

26. Customers request bids from ladle shroud and stopper rod suppliers and consider price, quality, service, and innovation in selecting the winning bidder. The proposed acquisition will eliminate Foseco as an independent bidder.

27. This reduction in the number of active bidders from three to two will reduce competition and likely will result in higher prices and/or reductions in service and innovation for a significant number of customers in the markets for ladle shrouds and stopper rods. The likely anticompetitive effect is heightened due to customers' preferences to maintain supply relationships with two independent suppliers simultaneously. In light of such preferences, the proposed acquisition will eliminate competition to be a customer's second supplier.

28. Foreign manufacturers likely will not have the incentive or ability to defeat an anticompetitive increase in price or reduction in service or innovation because of their high delivered costs, customers' preferences for North American suppliers, and/or the poor quality and reputation of their products.

29. The proposed acquisition will substantially lessen competition in the manufacture and sale of ladle shrouds and stopper rods in the United States in violation of section 7 of the Clayton Act.

E. Entry: New Entrants Will Not Defeat an Exercise of Market Power

30. Successful entry into the ladle shroud and stopper rod markets would not be timely, likely, or sufficient to deter the anticompetitive effects resulting from this transaction. Timely entry sufficient to replace the market impact of Foseco would be difficult for several reasons. A new entrant would need to acquire manufacturing facilities in North America and capital equipment; assemble or develop manufacturing, technical expertise, and personnel; conduct extensive customer trials; and establish a reputation for quality and reliability among U.S. customers. An entrant undertaking these steps would be unable to enter in less than two years.

31. There are foreign firms with a share of the U.S. market for more complex CBCs, known as subentry nozzles and subentry shrouds. Because of the expertise and reputation they have developed in these markets, theoretically they would be capable of entering the domestic market for ladle shrouds and stopper rods. None of these firms, however, are likely to open U.S. manufacturing facilities within the next several years.

V. Violation Alleged

32. The proposed acquisition of Foseco by Cookson would substantially lessen competition in interstate trade and commerce in violation of section 7 of the Clayton Act, 15 U.S.C. 18.

33. Unless restrained, the acquisition will have the following anticompetitive effects, among others:

a. Competition in the markets for the manufacture and sale of ladle shroud and stopper rods in the United States will be lessened substantially;

b. Actual and potential competition between Cookson and Foseco in the manufacture and sale of ladle shrouds and stopper rods in the United States will be eliminated; and

c. Prices for ladle shrouds and stopper rods in the United States likely will increase, and/or service and innovation likely will decline.

VI. Request for Relief

34. Plaintiff requests that:

a. Cookson's proposed acquisition of Foseco be adjudged and decreed to be unlawful and in violation of section 7 of the Clayton Act, 15 U.S.C. 18;

b. Defendants and all persons acting on their behalf be permanently enjoined and restrained from consummating the proposed acquisition or from entering into or carrying out any contract, agreement, plan, or understanding, the effect of which would be to combine Cookson with the operations of Foseco;

c. Plaintiff be awarded its costs for this action; and

d. Plaintiff receive such other and further relief as the Court deems just and proper.

Respectfully submitted,

For Plaintiff United States of America:

/s/

Thomas O. Barnett,

Assistant Attorney General
DC Bar #426840.
/s/
Maribeth Petrizzi,
Chief, Litigation II Section
D.C. Bar #435204.
/s/
David L. Meyer,
Deputy Assistant Attorney General
DC Bar #414420.
/s/
J. Robert Kramer II,
Director of Operations and
Civil Enforcement
/s/
Dorothy B. Fountain,
Assistant Chief, Litigation II Section
DC Bar #439469
/s/
Leslie Peritz,
Helena Gardner,
Attorneys, United States Department of Justice, Antitrust Division, Litigation II Section 1401 H Street, NW., Suite 3000, Washington, DC 20530 (202) 307–0924.
Dated: March 4, 2008.

Appendix A—Definition of ''HHI''

The term ''HHI'' means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2+30^2+20^2+20^2=2,600$). The HHI takes into account the relative size and distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and markets in which the HHI is in excess of 1800 points are considered to be highly concentrated. Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise significant antitrust concerns under the Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines.

United States District Court for the District of Columbia

United States of America, Plaintiff, v. Cookson Group PLC, Cookson America Inc., FOSECO PLC, and FOSECO Metallurgical Inc., Defendants; Case No.: 1:08–cv–00389, Judge: Urbina, Ricardo M. Deck Type: Antitrust; Date Stamp: March 4, 2008

Final Judgment

Whereas, Plaintiff, United States of America, filed its Complaint on March 4, 2008, the United States and defendants, Cookson Group plc and Cookson America Inc. and Foseco plc and Foseco Metallurgical Inc., by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, And without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

And whereas, defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the defendants to assure that competition is not substantially lessened;

And whereas, the United States requires defendants to make a certain divestiture for the purpose of remedying the loss of competition alleged in the Complaint;

And whereas, defendants have represented to the United States that the divestiture required below can and will be made and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *ordered, adjudged and decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against defendants under section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II. Definitions

As used in this Final Judgment:

A. ''Cookson'' means defendant Cookson Group plc, a United Kingdom corporation with its headquarters in London, England, and Cookson America Inc., a Delaware Corporation with its headquarters in Providence, Rhode Island and includes its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

B. ''Foseco'' means defendant Foseco plc, a United Kingdom corporation with its headquarters in Tamworth, Staffordshire, England, and Foseco Metallurgical Inc., a Delaware corporation with its headquarters in Cleveland, Ohio and includes its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. ''CBCs'' means consumable, isostatically pressed refractory products made of carbon-bonded alumina graphite that control the flow of molten steel from the steel ladle to the continuous casting mold during the continuous casting of steel.

D. ''Divestiture Business'' means Foseco's entire business engaged in the development, design, production, servicing, distribution, and sale of CBCs in the United States, including:

1. Foseco's Saybrook, Ohio facility, and the related leasehold;

2. all tangible assets used in the development, design, production, servicing, distribution, and sale of CBCs in the United States, including but not limited to all research data and activities and development activities; all manufacturing equipment, including but not limited to batch mix equipment, presses, drying and oven/kilning, finishing, packaging, and tooling; all fixed assets, real property (leased or owned), personal property, inventory, office furniture, materials, supplies, on- or off-site warehouses or storage facilities relating to the factory and property, and all other tangible property; all licenses, permits and authorizations issued by any governmental organization; all contracts, teaming arrangements, agreements, leases (including renewal rights), commitments, certifications, and understandings, including supply agreements; all customer lists, contracts, accounts, and credit records or similar records of all sales and potential sales; all sales support and promotional materials, advertising materials, and production, sales and marketing files; all repair and performance records; all other records; and, at the option of the Acquirer, Foseco's U.S. water-modeling assets;

3. all intangible assets used in the development, design, production, servicing, distribution, and sale of CBCs in the United States, including, but not limited to, all patents, all pending patent applications, licenses and sublicenses, intellectual property, copyrights, trademarks (registered and unregistered), trade names, service marks, and service names relating to the Divestiture Business, but excluding the corporate-level name and device and trademark of Foseco; all technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts

and devices, safety procedures for the handling of materials and substances, all research data concerning historic and current research and development; quality assurance and control procedures, design tools, and simulation capability; all manuals and technical information provided to employees, customers, suppliers, agents or licensees, and all research data concerning historic and current research and development efforts relating to the Divestiture Business, including, but not limited to, designs of CBCs, and the results of successful and unsuccessful designs and trials; and

4. notwithstanding anything to the contrary in this Final Judgment, if requested by an Acquirer, and subject to the approval of the United States in its sole discretion, defendants shall offer to enter into a transition services agreement for a limited period with respect to certain support services (e.g., HR, IT, and/or health and safety).

E. ''Bonnybridge Business'' means Foseco's European CBC business and its facilities in Bonnybridge, Stirlingshire, Scotland, which the European Commission has required to be divested along with the Divestiture Business.

F. ''Acquirer'' means the entity to which defendants divest the Divestiture Business.

III. Applicability

A. This Final Judgment applies to Cookson and Foseco, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with section IV and V of this Final Judgment, defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Business, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer of the assets divested pursuant to this Final Judgment.

IV. Divestiture

A. Defendants are ordered and directed, within ninety (90) calendar days after the filing of the Complaint in this matter, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Divestiture Business in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States, in its sole discretion after consultation with the European Commission. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed 60 calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Divestiture Business as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, defendants promptly shall make known, by usual and customary means, the availability of the Divestiture Business. Defendants shall inform any person making inquiry regarding a possible purchase of the Divestiture Business that it is being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Business customarily provided in a due diligence process except such information or documents subject to the attorney-client privileges or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendants shall provide the Acquirer and the United States information relating to the personnel involved in the production, operation, research and development, design, and sale of CBCs to enable the Acquirer to make offers of employment. Defendants shall not interfere with any negotiations by the Acquirer to employ or contract with any defendant employee responsible for any such activity related to the Divestiture Business.

D. Defendants shall permit prospective Acquirers of the Divestiture Business to have reasonable access to personnel responsible for the Divestiture Business; to make inspections of the physical facilities of the Divestiture Business; to have access to any and all environmental, zoning, and other permit documents and information; and to have access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Defendants shall warrant to the Acquirer that the Divestiture Business will be operational on the date of sale.

F. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Business.

G. Defendants shall warrant to the Acquirer that there are no material defects in the environmental, zoning or other permits pertaining to the operation of the Divestiture Business, and that following the sale of the Divestiture Business, defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Business.

H. Unless the United States otherwise consents in writing, the divestiture pursuant to section IV, or by trustee appointed pursuant to section V, of this Final Judgment, shall include the entire Divestiture Business, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Business can and will be used by the Acquirer as part of a viable, ongoing business for the manufacture and sale of CBCs in the United States. The divestiture, whether pursuant to section IV or section V of this Final Judgment,

1. shall be made to the acquirer of the Bonnybridge Business;

2. shall be made to an Acquirer that, in the United States's sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the manufacture and sale of CBCs in the United States; and

3. shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer and defendants give defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively in the manufacture and sale of CBCs in the United States.

V. Appointment of Trustee

A. If defendants have not divested the Divestiture Business within the time period specified in section IV(A), defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States, in consultation with the European Commission to ensure selection of a trustee acceptable to both the United States and the European Commission, and approved by the Court to effect the divestiture of the Divestiture Business.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Business. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of sections IV, V, and

VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to section V(D) of this Final Judgment, the trustee may hire at the cost and expense of defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance or that the Acquirer has not been approved by the European Commission. Any objection by defendants on the ground of trustee malfeasance must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under section VI; any objection by defendants based on lack of approval from the European Commission must be conveyed in writing to the United States and the trustee within the later of (i) five (5) days after the United States provides defendants with written notice, pursuant to section VI(C), stating that it does not object to the proposed divestiture of the Divestiture Business or (ii) two (2) business days after the European Commission notifies defendants that it does not approve of the proposed Acquirer. D. The trustee shall serve at the cost and expense of defendants, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendants and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Business and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Business, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Business.

G. If the trustee has not accomplished the divestiture ordered under this Final Judgment within six months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement, defendants or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Business, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from defendants, the proposed Acquirer(s), any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer(s), and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer(s), any third party, and the trustee, whichever is later, the United States shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under section V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under section IV or section V shall not be consummated. Upon objection by defendants under section V(C), a divestiture proposed under section V shall not be consummated unless approved by the Court.

VII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to section IV or V of this Final Judgment.

VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

IX. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has

been completed under section IV or V, defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Business, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendants have taken to solicit buyers for the Divestiture Business, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by defendants, including limitations on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with section VIII of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Business until one year after such divestiture has been completed.

X. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

1. Access during defendants' office hours to inspect and copy, or at the option of the United States, to require defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. No Reacquisition

Defendants may not reacquire any part of the Divestiture Business during the term of this Final Judgment.

XII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIII. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

XIV. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date:

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

United States District Judge.

The United States District Court for the District of Columbia

United States of America, Plaintiff, v. Cookson Group PLC, Cookson America Inc., FOSECO PLC, and FOSECO Metallurgical Inc., Defendants; Case No.: 1:08–cv–00389; Judge: Urbina, Ricardo M.; Deck Type: Antitrust; Date Stamp: March 4, 2008.

Competitive Impact Statement

Plaintiff United States of America (''United States''), pursuant to section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

Defendant Cookson Group plc and Defendant Foseco plc have entered into an agreement whereby Cookson will acquire Foseco. The United States filed a civil antitrust Complaint on March, 2008 seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially in the markets for certain isostatically pressed carbon bonded ceramics products (''CBCs''), in violation of section 7 of the Clayton Act, 15 U.S.C. 18. This loss of competition likely would result in increased prices and/or a reduction in service and

innovation in the manufacture and sale of such CBCs in the United States.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order (''Hold Separate'') and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, defendants are required to divest Foseco's business engaged in the development, design, production, servicing, distribution, and sale of CBCs in the United States, including the CBC plant in Saybrook, Ohio and related assets (hereafter the ''Divestiture Business''). Under the terms of the Hold Separate, defendants will take certain steps to ensure that the Divestiture Business is operated as a competitively independent, economically viable, and ongoing business concern; that it will remain independent and uninfluenced by the consummation of the acquisition; and that competition in the market for CBCs is maintained during the pendency of the ordered divestiture.

The United States and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. The Defendants and the Proposed Transaction

Cookson, a United Kingdom corporation with its headquarters in London, England, is a manufacturer and processor of ceramics, electronics, and precious metals. Cookson, through its subsidiary, Cookson America Inc., manufactures CBCs in the United States and Mexico and sells them throughout the United States. In 2006, Cookson's U.S. CBC revenues were about $75 million.

Foseco, a United Kingdom corporation with its headquarters in Staffordshire, England, manufactures refractories and related products for sale and offers services worldwide to the steel and foundry industries. Foseco, through its subsidiary, Foseco Metallurgical Inc., manufactures CBCs in the United States and sells them throughout the United States. In 2006, Foseco's U.S. CBC revenues were about $4 million.

On October 11, 2007, Cookson and Foseco announced that they had reached an agreement on the terms of a recommended cash offer by Cookson for the entire issued and to-be-issued share capital of Foseco in a transaction valued at approximately $1 billion.

B. The Competitive Effects of the Transaction

1. CBCs Generally

Refractories are non-metallic ceramics that serve as a heat buffer or lining in industrial devices because they withstand extremely high temperatures. In the steelmaking process, refractory products serve as barriers between hot molten steel and the non-consumable equipment such as the furnaces, ladles (large containers that receive molten steel from a furnace), and tundishes (receptacles that receive steel from the ladle).

CBCs are consumable, isostatically pressed refractory products that control the flow of molten steel from the ladle to the tundish and onto the continuous casting mold during the continuous casting process. Isostatic pressing is a process used in the manufacture of CBCs to increase the refractory materials' density and homogeneity, resulting in a CBC with increased thermal shock resistance and resistivity to chemical attack. Carbon-bonded alumina graphite is the main refractory material used to make CBCs. CBCs are consumed through exposure to molten steel and must be replaced frequently.

The ''design'' of a CBC refers to both its shape and the alumina graphite recipe. Each customer uses different designs tailored to the equipment it uses in the casting process. Customers with multiple plants require custom-designed CBCs for each plant and may require multiple custom-designed CBCs within each plant. Designs depend on variables such as the customer's cast strand size and shape, casting speed, and the steel grades produced. Customers change CBC recipes and/or shapes in order to improve steel quality, meet new steel specifications, or save on CBC costs.

CBCs undergo rigorous testing by the manufacturer and the customer to ensure reliable performance and value under actual casting conditions. Because CBCs are critical to the steelmaking process, most customers have a policy of splitting sales between at least two suppliers to ensure supply.

2. Relevant Product Markets

Ladle Shrouds

The Complaint alleges that the manufacture and sale of ladle shrouds is a line of commerce and a relevant product market within the meaning of section 7 of the Clayton Act. Ladle shrouds are CBCs that prevent molten steel from re-oxidizing and ensure the steel transfers safely from the ladle to the tundish.

There are no good substitutes for ladle shrouds. The Complaint alleges that a small but significant post-acquisition increase in the price of ladle shrouds would not cause customers to substitute another product or otherwise reduce their usage of ladle shrouds in sufficient quantities so as to make such a price increase unprofitable. Accordingly, the manufacture and sale of ladle shrouds is a relevant product market.

Stopper Rods

The Complaint alleges that the manufacture and sale of stopper rods is a line of commerce and a relevant product market within the meaning of section 7 of the Clayton Act. Stopper rods are CBCs used to control the flow of steel out of the tundish and are one of two types of devices, the other being slide gate systems, that can perform this function. The choice of device depends on the design of the tundish. Once the choice of tundish design has been made, a customer cannot switch from a stopper rod to a slide gate system without also replacing or substantially reconfiguring the tundish-significantly disrupting their operations.

The Complaint alleges that, because of high switching costs, a small but significant post-acquisition increase in the price of stopper rods would not cause customers to switch to slide gate systems or otherwise reduce their usage of stopper rods in sufficient quantities so as to make such a price increase unprofitable. Accordingly, the manufacture and sales of stopper rods is a relevant product market.

3. Relevant Geographic Market

Cookson and Foseco manufacture ladle shrouds and stopper rods at facilities in North America for sale in the United States. The Complaint alleges that virtually all ladle shrouds and stopper rods purchased by customers in the United States are produced in plants located in North America. Although a few manufacturers outside of North America make ladle shrouds and stopper rods, firms with production facilities in North America have a significant advantage over these foreign manufacturers in delivered cost and/or in competing for customers that value shorter lead times in their supply chain.

The Complaint alleges that a small but significant post-acquisition increase in the price of ladle shrouds and stopper

rods would not cause customers in North America to switch to purchases from manufacturers outside of North America in sufficient numbers so as to make such a price increase unprofitable. Accordingly, the relevant geographic market for ladle shrouds and stopper rods is North America.

4. Anticompetitive Effects

Cookson and Foseco are two of only three firms that manufacture and sell the vast majority of ladle shrouds and stopper rods to U.S. customers. Cookson and Foseco have competed with one another on price, service, and innovation in the markets for stopper rods and ladle shrouds. The markets for ladle shrouds and stopper rods would become substantially more concentrated if Cookson acquires Foseco. For example, Cookson and Foseco would have a combined share of approximately 75 percent. Using a measure of market concentration called the Herfindahl-Hirschman Index (''HHI'') (defined and explained in Appendix A), the proposed transaction will increase the HHI in both markets by approximately 700 points to a post-transaction level in excess of 6000.

Customers request bids from ladle shroud and stopper rod suppliers and consider price, quality, service, and innovation when selecting the winning bidder. The proposed acquisition will eliminate Foseco as an independent bidder. This reduction in the number of active bidders from three to two will reduce competition and likely will result in higher prices and/or reductions in service and innovation for a significant number of customers in the markets for ladle shrouds and stopper rods. The likely anticompetitive effects are heightened due to customers' preferences to maintain supply relationships with two independent suppliers simultaneously. In light of such preferences, the proposed acquisition will eliminate competition to be a customer's second supplier.

Moreover, manufacturers outside of North America likely will not have the incentive or ability to defeat an anticompetitive increase in price or reduction in service or innovation because of their high delivered costs, customers' preferences for North American suppliers, and/or the poor quality and reputation of their products.

Further, successful entry into the ladle shroud and stopper rod markets would not be timely, likely, or sufficient to deter the anticompetitive effects resulting from this transaction. Timely entry sufficient to replace the market impact of Foseco would be difficult for several reasons. A new entrant would need to acquire capital equipment and manufacturing facilities in North America; assemble or develop manufacturing, technical, and personnel expertise; conduct extensive customer trials; and establish a reputation for quality and reliability among U.S. customers. An entrant undertaking these steps would need to undertake these steps would be unable to enter in less than two years.

There are foreign firms with a share of the U.S. market for more complex CBCs. Because of the expertise and reputation they have developed in these markets, theoretically they are capable of entering the domestic market for ladle shrouds and stopper rods. None of these firms, however, is likely to open North American manufacturing facilities within the next several years.

As a result of these barriers to entry into the North American market for ladle shrouds and stopper rods, entry by any other firm into the manufacture and sale of ladle shrouds and stopper rods will not be timely, likely, or sufficient to deter the anticompetitive effects resulting from this transaction.

III. Explanation of the Proposed Final Judgment

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the markets for ladle shrouds and stopper rods by establishing a new, independent, and economically viable competitor. The proposed Final Judgment requires defendants, within 90 days after the filing of the Complaint, or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest, as a viable ongoing business, the Divestiture Business, which includes Foseco's CBC plant in Saybrook, Ohio and related tangible and intangible assets.[1] The assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Business can and will be operated by the purchaser as a viable, ongoing business capable of competing effectively in the relevant markets. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

In the event that defendants do not accomplish the divestiture within the period prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

Selected Provisions of the Proposed Final Judgment

Section IV(H) of the proposed Final Judgment requires defendants to sell the Divestiture Business—Foseco's CBC business in the United States—to the acquirer of Foseco's European CBC business, which includes assets in Bonnybridge, Stirlingshire, Scotland (the ''Bonnybridge Business''). This requirement is warranted because the European Commission is requiring defendants to divest the Bonnybridge Business, and because of the practical difficulties of splitting between two acquirers rights to certain intellectual property and know-how used by both businesses.

Because the United States and the European Commission both must approve the same acquirer, section IV(A) of the proposed Final Judgment provides that the United States will consult with the European Commission in exercising its review of defendants' sale of the Divestiture Business in a manner consistent with the proposed Final Judgment, to an acquirer acceptable to the United States in its sole discretion. As noted above, if the defendants do not divest the Divestiture Business within the required time period, the Court, upon application of the United States, is to appoint a trustee to complete the divestiture. Because the European Commission also requires selection of a trustee if the divestiture is not completed within a certain time,

[1] The parties agreed to remedy the adverse effects in the markets for ladle shrouds and stopper rods by divesting the entire U.S. CBC business, including the Saybrook facility where Foseco manufactures all of the CBCs it sells in the United States. The proposed remedy would enable the purchaser to offer the ''full line'' of CBCs currently being sold by Foseco—including, for instance, subentry nozzles and subentry shrouds—which would ensure that the purchaser would have the incentive and all the assets necessary to be an effective, long-term competitor in these products.

section V(A) of the proposed Final Judgment provides that the United States shall select a trustee after consultation with the European Commission to ensure selection of a trustee acceptable to both the United States and the European Commission.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the manufacture and sale of ladle shrouds and stopper rods in the United States.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 1401 H St. NW., Suite 3000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Cookson's acquisition of Foseco. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of ladle shrouds and stopper rods in the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(l). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1) (A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); see generally United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d I (D.D.C. 2007) (assessing public interest standard under the Tunney Act).[2]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See Microsoft, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); see also Microsoft, 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''within the reaches of the public interest.'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[3] In

[2] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. Compare 15 U.S.C. 16(e) (2004), with 15 U.S.C. 16(e)(1) (2006); see also SBC Commc'ns, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[3] Cf. BNS, 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). See generally Microsoft, 56 F.3d at 1461 (discussing whether ''the

determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' SBC Commc'ns, 489 F. Supp. 2d at 17; see also Microsoft, 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), aff'd sub nom. *Maryland* v. *United States*, 460 U.S. 1001 (1983); see also *United States* v. *Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' SBC Commc'ns, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' Microsoft, 56 F.3d at 1459. Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. Id. at 1459–60. As this Court recently confirmed in SBC Communications, courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' SBC Commc'ns, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' SBC Commc'ns, 489 F. Supp. 2d at 11.[4]

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: March 4, 2008.

Respectfully submitted,

Leslie Peritz, Helena Gardner,

Attorneys United States Department of Justice, Antitrust Division, Litigation II, 1401 H Street, NW., Suite 3000, Washington, DC 20530, (202) 307–0924.

[FR Doc. E8–5129 Filed 3–17–08; 8:45 am]

BILLING CODE 4410–11–M

remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' '').

[4] See *United States* v. *Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.''); *United States* v. *Mid-Am. Dairymen, Inc.*, 1977–1 Trade Cas. (CCH) 61,508, at 71,980 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.'').

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

March 13, 2008.

The Department of Labor (DOL) hereby announces the submission of the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of this ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number) / e-mail: *king.darrin@dol.gov*.

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for Departmental Management (DM), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–7316 / Fax: 202–395–6974 (these are not a toll-free numbers), E-mail: *OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Office of Small Business Programs.

Type of Review: Extension without change of a currently approved collection.

Title: Small Business Programs Information Management System.

OMB Number: 1290–0002.

Affected Public: Private Sector—Business or other not for-profits.

Estimated Number of Respondents: 1,000.

Estimated Total Annual Burden Hours: 150.

Estimated Total Annual Costs Burden: $0.

Description: The Small Business Programs Information Management System gathers, documents, and manages information for DOL's Office of Small Business Programs' constituency groups. This system allows constituent groups to voluntarily provide information about their organizations. The information is used by DOL to maximize communication with the respective constituency groups regarding relevant small business programs, initiatives, and procurement opportunities; to track and solicit feedback on customer service to group members; and to facilitate registration of group members for DOL-sponsored activities.

Darrin A. King,

Acting Departmental Clearance Officer.

[FR Doc. E8–5379 Filed 3–17–08; 8:45 am]

BILLING CODE 4510–22–P

LEGAL SERVICES CORPORATION

Sunshine Act Meetings of the Board of Directors and One of its Committees; Amended Notice: Technical Correction to the Agenda; Board of Directors Meeting

Notice: The Legal Services Corporation (LSC) is announcing an amendment to the notice of the March 24, 2008 meeting of the Board of Directors, the second of two meetings being held on that date. The amendment is being made to reflect a technical correction to the meeting *Agenda* of the Board of Directors. There are no other changes to the original notice.

Specifically, the following correction has been made to the Board of Directors meeting agenda.

• The language at item 3 of the agenda of the Board of Directors has been corrected to read: ''Consider and act on LSC *Code of Ethics and Conduct* and designation of Ethics Officer(s)'' [Emphasis added.]

MEETING SCHEDULE [1]

Monday, March 24, 2008	Time
1. 2008 Ad Hoc Committee.	4:30 p.m.
2. Board of Directors	(Follows Immediately.).

[1] Please note that the times in this notice are Eastern Daylight Saving Time.

LOCATION: 3333 K Street, NW., Washington, DC 20007, 3rd Floor Conference Center.

STATUS OF MEETINGS: Open. Directors will participate by telephone conference in such a manner as to enable interested members of the public to hear and identify all persons participating in the meeting. Members of the public wishing to observe the meeting may do so by joining participating staff at the location indicated above. Members of the public wishing to listen to the meeting by telephone should call 1–800–857–4830 and enter 34309 on the key pad when prompted. To enhance the quality of your listening experience as well as that of others, and to eliminate background noises that interfere with the audio recording of the proceeding, please mute your telephone during the meeting.

Amended Agenda

Board of Directors

MATTERS TO BE CONSIDERED:

1. Report of 2008 Ad Hoc Committee.
2. Consider and act on recommendations of the 2008 Ad Hoc Committee.
3. Consider and act on LSC *Code of Ethics* and *Conduct* and designation of Ethics Officer(s).
4. Consider and act on dissolution of 2007 Search Committee for LSC Inspector General.
5. Consider and act on other business.
6. Consider and act on motion to adjourn the meeting.

CONTACT PERSON FOR INFORMATION: Patricia D. Batie, Manager of Board Operations, at (202) 295–1500.

SPECIAL NEEDS: Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia D. Batie, at (202) 295–1500.

Dated: March 14, 2008.

Victor M. Fortuno,

Vice President, General Counsel & Corporate Secretary.

[FR Doc. 08–1056 Filed 3–14–08; 2:41 pm]

BILLING CODE 7050–01–P

THE NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: The National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given that the following meetings of Humanities Panels will be held at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Heather C. Gottry, Acting Advisory Committee Management Officer, National Endowment for the Humanities, Washington, DC 20506; telephone (202) 606–8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the Endowment's TDD terminal on (202) 606–8282.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by the grant applicants. Because the proposed meetings will consider information that is likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential and/or information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, pursuant to authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee meetings, dated July 19, 1993, I have determined that these meetings will be closed to the public pursuant to subsections (c) (4), and (6) of section 552b of Title 5, United States Code.

1. *Date:* April 1, 2008.
Time: 8:30 a.m. to 5:30 p.m.
Room: 421.
Program: This meeting will review applications for America's Historical and Cultural Organizations in Planning and Implementation Grants Program, submitted to the Division of Public Programs, at the January 23, 2008 deadline.

2. *Date:* April 2, 2008.
Time: 8:30 a.m. to 5 p.m.
Room: 421.
Program: This meeting will review applications for America's Media

Makers in Production and Development Grants Program, submitted to the Division of Public Programs, at the January 23, 2008 deadline.

3. *Date:* April 7, 2008.
Time: 8:30 a.m. to 5:30 p.m.
Room: 421.
Program: This meeting will review applications for America's Historical and Cultural Organizations in Planning and Implementation Grants Program, submitted to the Division of Public Programs, at the January 23, 2008 deadline.

4. *Date:* April 9, 2008.
Time: 8:30 a.m. to 5:30 p.m.
Room: 421.
Program: This meeting will review applications for Interpreting America's Historic Places in Planning and Implementation Grants Program, submitted to the Division of Public Programs, at the January 23, 2008 deadline.

5. *Date:* April 10, 2008.
Time: 9 a.m. to 5:30 p.m.
Room: 415.
Program: This meeting will review applications for We the People Challenge Grants, submitted to the Office of Challenge Grants, at the February 5, 2008 deadline.

6. *Date:* April 14, 2008.
Time: 8:30 p.m. to 5:30 p.m.
Room: 421.
Program: This meeting will review applications for America's Historical and Cultural Organizations in Planning and Implementation Grants Program, submitted to the Division of Public Programs, at the January 23, 2008 deadline.

7. *Date:* April 15, 2008.
Time: 8:30 a.m. to 5:30 p.m.
Room: 421.
Program: This meeting will review applications for America's Media Makers in Production and Development Grants Program, submitted to the Division of Public Programs, at the January 23, 2008 deadline.

8. *Date:* April 17, 2008.
Time: 8:30 a.m. to 5:30 p.m.
Room: 421.
Program: This meeting will review applications for Interpreting America's Historic Places in Planning and Implementation Grants Program, submitted to the Division of Public Programs, at the January 23, 2008 deadline.

9. *Date:* April 22, 2008.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Summer Seminars and Institutes for College and University Teachers, submitted to the Division of Education Programs, at the March 3, 2008 deadline.

10. *Date:* April 23, 2008.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Summer Seminars and Institutes for School Teachers, submitted to the Division of Education Programs, at the March 3, 2008 deadline.

11. *Date:* April 24, 2008.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Summer Seminars and Institutes for School Teachers, submitted to the Division of Education Programs, at the March 3, 2008 deadline.

12. *Date:* April 28, 2008.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Summer Seminars and Institutes for College and University Teachers, submitted to the Division of Education Programs, at the March 3, 2008 deadline.

13. *Date:* April 29, 2008.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Summer Seminars and Institutes for School Teachers, submitted to the Division of Education Programs, at the March 3, 2008 deadline.

14. *Date:* April 30, 2008.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Summer Seminars and Institutes for College and University Teachers, submitted to the Division of Education Programs, at the March 3, 2008 deadline.

Heather C. Gottry,

Acting Advisory Committee Management Officer.

[FR Doc. E8–5363 Filed 3–17–08; 8:45 am]

BILLING CODE 7536–01–P

NUCLEAR REGULATORY COMMISSION

Draft Regulatory Guide: Issuance, Availability

AGENCY: Nuclear Regulatory Commission.

ACTION: Issuance, Availability of Draft Regulatory Guide (DG)–3032.

FOR FURTHER INFORMATION CONTACT: B. Von Till, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: (301) 415–0598 or e-mail *RWV@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) has issued for public comment a draft regulatory guide in the agency's ''Regulatory Guide'' series. This series was developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

The draft regulatory guide (DG), entitled, ''Design, Construction, and Inspection of Embankment Retention Systems at Uranium Recovery Facilities,'' is temporarily identified by its task number, DG–3032, which should be mentioned in all related correspondence.

This draft guide updates and combines the guidance currently found in Revision 2 of Regulatory Guide 3.11, ''Design, Construction, and Inspection of Embankment Retention Systems for Uranium Mills,'' and Revision 1 of Regulatory Guide 3.11.1, ''Operational Inspection and Surveillance of Embankment Retention Systems for Uranium Mill Tailings.''

The mining and milling of uranium ores generates large volumes of liquid and solid wastes (tailings). These tailings are usually stored behind manmade retaining structures much like other commercial mining and milling operations. In addition, other liquid wastes from operations and ground-water corrective action activities at uranium recovery facilities are often retained behind evaporation pond embankments. This draft guide describes engineering practices and methods generally considered by the NRC to be satisfactory for the design, construction, and inspection of the embankment retention systems used for retaining liquid and solid wastes from uranium recovery operations. These practices and methods are the result of NRC review and action on a number of specific cases, and they reflect the latest engineering approaches acceptable to the NRC staff. If future information results in alternative methods, the NRC staff will review such methods to determine their acceptability.

The NRC staff is of the opinion that the latest advances in geotechnical

engineering, together with engineering experience and knowledge available in the field of water storage dams and retention structures, can be used in the design and construction of uranium recovery retention systems. The basic concepts of conventional water storage impoundments can be suitably modified to produce economical designs that will ensure the stability of the retention system and minimal contamination. Draft Guide 3032 describes methods and processes the NRC finds acceptable for the design, construction, and inspection of embankment retention systems at uranium recovery facilities.

When finalized and issued, DG–3032 will be entered into the agency's ''Regulatory Guide'' series as Revision 3 of Regulatory Guide 3.11 where it will replace both Revision 2 of Regulatory Guide 3.11 and Revision 1 of Regulatory Guide 3.11.1.

II. Further Information

The NRC staff is soliciting comments on DG–3032. Comments may be accompanied by relevant information or supporting data, and should mention DG–3032 in the subject line. Comments submitted in writing or in electronic form will be made available to the public in their entirety through the NRC's Agencywide Documents Access and Management System (ADAMS).

Personal information will not be removed from your comments. You may submit comments by any of the following methods:

1. Mail comments to: Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

2. E-mail comments to: *NRCREP@nrc.gov.*

3. Hand-deliver comments to: Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

4. Fax comments to: Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission at (301) 415–5144.

Requests for technical information about DG–3032 may be directed to the NRC Senior Program Manager, B. Von Till at (301) 415–0598 or e-mail at *RWV@nrc.gov.*

Comments would be most helpful if received by May 16, 2008. Comments received after that date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

Electronic copies of DG–3032 are available through the NRC's public Web site under Draft Regulatory Guides in the ''Regulatory Guides'' collection of the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections/.* Electronic copies are also available in ADAMS (*http://www.nrc.gov/reading-rm/adams.html*), under Accession No. ML080180036.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at 11555 Rockville Pike, Rockville, Maryland. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4205, by fax at (301) 415–3548, and by e-mail to *PDR@nrc.gov.*

Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

Dated at Rockville, Maryland, this 11th day of March, 2008.

For the Nuclear Regulatory Commission.

Andrea D. Valentin,

Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. E8–5400 Filed 3–17–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–382]

Entergy Operations, Inc.; Waterford Steam Electric Station, Unit 3; Exemption

1.0 Background

Entergy Operations, Inc. (the licensee), is the holder of Facility Operating License No. NPF–38, which authorizes operation of the Waterford Steam Electric Station, Unit 3 (Waterford 3). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect.

The facility consists of one pressurized-water reactor located in St. Charles Parish, Louisiana.

2.0 Request/Action

Title 10 of the Code of Federal Regulations (10 CFR), 50.46(a)(1)(i), ''Acceptance criteria for emergency core cooling systems for light-water nuclear power reactors,'' states:

> ''Each boiling or pressurized light-water nuclear power reactor fueled with uranium oxide pellets within cylindrical zircaloy or ZIRLO cladding must be provided with an emergency core cooling system (ECCS) that must be designed so that its calculated cooling performance following postulated loss-of-coolant accidents conforms to the criteria set forth in paragraph (b) of this section.''

Paragraph I.A.5 of Appendix K to 10 CFR Part 50 states:

> ''Metal—Water Reaction Rate. The rate of energy release, hydrogen generation, and cladding oxidation from the metal/water reaction shall be calculated using the Baker-Just equation (Baker, L., Just, L.C., ''Studies of Metal Water Reactions at High Temperatures, III. Experimental and Theoretical Studies of the Zirconium-Water Reaction,'' ANL–6548, page 7, May 1962).''

The April 24, 2007 exemption request relates to the specific types of cladding material specified in the regulations. As written, the regulations presume the use of zircaloy or ZIRLO™ fuel rod cladding. Also, since the Baker-Just equation presumes the use of zircaloy clad fuel, strict application of the rule would not permit use of the equation for Optimized ZIRLO™ cladding for determining acceptable fuel performance. Thus, exemptions from the specific requirements of 10 CFR 50.46 and Appendix K to 10 CFR Part 50 are needed to allow a cladding alloy other than zircaloy or ZIRLO™.

Accordingly, this exemption would result in changes to the plant by allowing only the use of an alternative cladding alloy other than zircaloy or ZIRLO™ in lieu of meeting the specific cladding requirements of 10 CFR 50.46 and Appendix K to 10 CFR Part 50. Specifically, the exemption would allow the use of Optimized ZIRLO™ cladding. All other requirements of 10 CFR 50.46 and of Appendix K to 10 CFR Part 50 would remain applicable.

3.0 Discussion

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR Part 50 when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) when special circumstances are present. As discussed below, special circumstances are present because the continued operation of Waterford 3 with zircaloy or ZIRLO™ fuel rod cladding, rather than with Optimized ZIRLO™, is

not necessary to achieve the underlying purpose of the rule.

Authorized by Law

This exemption would result in changes to the plant by allowing use of an alternative cladding (Optimized ZIRLO™) alloy other than zircaloy or ZIRLO™ in lieu of meeting the requirements of 10 CFR 50.46 and Appendix K to 10 CFR Part 50. As stated above, 10 CFR 50.12 allows the NRC to grant exemptions from the requirements of 10 CFR 50.46 and Appendix K to 10 CFR Part 50. The NRC staff has determined that granting of the licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

No Undue Risk to Public Health and Safety

The underlying purpose of 10 CFR 50.46 is to establish acceptance criteria for adequate ECCS performance. The underlying purpose of Paragraph I.A.5 of Appendix K to 10 CFR Part 50 is to calculate the rates of energy, hydrogen concentration, and cladding oxidation from the metal-water reaction using the Baker-Just equation. Based on the above and on the NRC staff's previously documented topical report safety review as discussed further below, in the context of the proposed exemption, no new accident precursors are created by allowing the use of an alternative cladding (Optimized ZIRLO™) alloy other than zircaloy or ZIRLO™. Thus, the probability of postulated accidents is not increased. For the same reasons, the consequences of postulated accidents are not increased. Therefore, there is no undue risk to public health and safety.

Consistent With Common Defense and Security

The proposed exemption would allow the use of an alternative cladding (Optimized ZIRLO™) alloy other than zircaloy or ZIRLO™. This change to the plant has no relation to security issues. Therefore, the common defense and security is not impacted by this exemption.

Special Circumstances

Pursuant to 10 CFR 50.12(a)(2)(ii), special circumstances are present whenever application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule. The underlying purpose of 10 CFR 50.46 is to establish acceptance criteria for adequate ECCS performance. As previously documented in the NRC staff's review of topical reports submitted by Westinghouse Electric Company, LLC (Westinghouse), and subject to compliance with the specific conditions of approval established therein, the NRC staff finds that the applicability of these ECCS acceptance criteria to Optimized ZIRLO™ has been demonstrated by Westinghouse. Ring compression tests performed by Westinghouse on Optimized ZIRLO™ (NRC-reviewed, approved, and documented in Appendix B of WCAP–12610–P–A and CENPD–404–P–A, Addendum 1–A, ''Optimized ZIRLO™,'' July 2006, Agencywide Documents Access and Management System (ADAMS) Accession No. ML062080576) demonstrate an acceptable retention of post-quench ductility up to 10 CFR 50.46 limits of 2200 degrees Fahrenheit and 17 percent equivalent clad reacted (ECR). Furthermore, the NRC staff has concluded that oxidation measurements provided by the licensee (letter from Westinghouse to NRC, ''SER Compliance with WCAP–12610–P–A & CENPD–404–P–A Addendum 1–A 'Optimized ZIRLO™','' LTR–NRC–07–58, November 6, 2007, ADAMS Accession No. ML073130562) illustrate that oxide thickness (and associated hydrogen pickup) for Optimized ZIRLO™ at any given burnup would be less than both zircaloy-4 and ZIRLO™. Hence, the NRC staff concludes that Optimized ZIRLO™ would be expected to maintain better post-quench ductility than ZIRLO™. This finding is further supported by an ongoing loss-of-coolant accident (LOCA) research program at Argonne National Laboratory, which has identified a strong correlation between cladding hydrogen content (due to in-service corrosion) and post-quench ductility.

In addition, utilizing currently approved LOCA models and methods, Westinghouse will perform an evaluation to ensure that the Optimized ZIRLO™ fuel rods continue to satisfy 10 CFR 50.46 acceptance criteria. For the reasons above, granting the exemption request will ensure that the underlying purpose of the rule is achieved.

Paragraph I.A.5 of Appendix K to 10 CFR Part 50 states that the rates of energy release, hydrogen concentration, and cladding oxidation from the metal-water reaction shall be calculated using the Baker-Just equation. Since the Baker-Just equation presumes the use of zircaloy clad fuel, strict application of the rule would not permit use of the equation for Optimized ZIRLO™ cladding for determining acceptable fuel performance. However, the NRC staff has found that metal-water reaction tests performed by Westinghouse on Optimized ZIRLO™ (NRC-reviewed, approved, and documented in Appendix B of WCAP–12610–P–A and CENPD–404–P–A, Addendum 1–A and subject to compliance with the specific conditions of approval established therein) demonstrate conservative reaction rates relative to the Baker-Just equation. Thus, the NRC staff agrees that application of Appendix K, paragraph I.A.5 is not necessary to achieve the underlying purpose of the rule in these circumstances. Accordingly, the NRC staff has determined that the special circumstances required by 10 CFR 50.12 (a)(2)(ii) for granting an exemption from the aforementioned specific paragraphs of 10 CFR 50.46 and Appendix K of 10 CFR Part 50 exist.

4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present. Therefore, the Commission hereby grants Entergy Operations, Inc., an exemption from the specific cladding requirements of 10 CFR 50.46, ''Acceptance criteria for emergency core cooling systems for light-water nuclear power reactors,'' and of Appendix K to 10 CFR Part 50, ''ECCS Evaluation Models,'' to allow the use of Optimized ZIRLO™ fuel rod cladding material in future core reload applications for Waterford 3.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment as published in the **Federal Register** on October 22, 2007 (72 FR 59560).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 11th day of March 2008.

For the Nuclear Regulatory Commission.

Catherine Haney,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8–5381 Filed 3–17–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–369]

Duke Power Company, LLC; Mcgure Nuclear Station, Unit 1; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption from Title 10 of the *Code of Federal Regulations* (10 CFR) Part 74, § 74.19(c), for Facility Operating License No. NPF–9, issued to Duke Power Company, LLC (the licensee), for operation of the McGuire Nuclear Station, Unit 1, located in Mecklenburg County, North Carolina. Therefore, as required by 10 CFR 51.35 and 51.119, the NRC is publishing this environmental assessment and finding of no significant impact.

Environmental Assessment

Background

Duke Power Company, LLC (the licensee) is the holder of Facility Operating License No. NPF–9 which authorizes operation of the McGuire Nuclear Station, Unit 1 (McGuire 1), located in Mecklenburg County, North Carolina. The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the Nuclear Regulatory Commission (NRC), now or hereafter in effect.

In 1986, a fuel assembly (D03) was found to have been damaged, and this resulted in fuel pellets being released from some of the assembly's fuel rods. The licensee vacuumed the loose fuel pellets and placed them, along with the vacuum filters, in a pellet-can. A metal plate was placed on top of the filters, and the pellet-can was placed into a storage cell in the McGuire 1 spent fuel pool (SFP).

At the time of the event, commercial containers were not available to store the recovered material. As such, a container was constructed onsite with readily available material. The container is approximately 12 feet in length. The bottom portion is constructed of metal plates welded together in the form of a rectangular can. The top portion consists of four right-angled metal bars welded to the bottom portion of the pellet-can. These four right-angled metal bars extend the entire length of the pellet-can. To close off the open area of the top portion of the pellet-can, a steel mesh screen was tack-welded to the metal bars. At the top of the pellet-can, two bolt studs were welded in opposite corners. To move the pellet-can, two wire ropes are used to snag the bolt studs.

Since the initial placement into the SFP in 1986, the pellet-can has not been moved or lifted until the licensee conducted a physical inventory in 2007. During the 2007 inventory, the pellet-can was moved to a low dose area in the SFP in order to take radiation readings of the pellet-can. Since the loose pellets in the pellet-can are not visible, an underwater radiation detector was used to acquire dose rate measurements as part of the 2007 physical inventory. The results of this verification provided an indirect means of determining the presence of fuel pellet material within the pellet-can. High dose rate measurements provided confirmation of fuel pellet material within the pellet-can. Although this method is not capable of precisely determining the exact number of pellets, the results indicate multiple pellets within the pellet-can. Depending on the exact location and orientation, there are potentially as many as five or six fuel pellets stored within the pellet-can.

In addition, the licensee conducted a video inspection of the pellet-can which showed a plate and small segments of the filter medium around the edges of the plate. This configuration appears consistent with the description of the pellet-can contents as provided by personnel involved with the 1986 incident and the station records from that time. The loose pellets and fuel fragments within the pellet-can have always been treated as Special Nuclear Material (SNM).

When moved during the 2007 physical inventory, degradation of the pellet-can was observed. During handling, removal of the steel mesh screen was necessary, since it was partially unattached, leaving the top portion of the pellet-can open.

In order to take radiation readings of the pellet-can, the licensee must again move the pellet-can to a low dose area in the SFP. Due to both the method used to handle the pellet-can and the pellet-can's degradation, there is a possible risk of dropping fuel pellets. Instead of utilizing a radiation monitor, the licensee is requesting the use of a video inspection of the interior of the pellet-can to verify that its contents have not been disturbed since the previous inspection.

Identification of the Proposed Action

Per its letter of December 3, 2007, the licensee has requested an exemption from the requirements of 10 CFR 74.19(c) to address the physical inventory of loose fuel pellets stored in a container (pellet-can) located in the McGuire 1 SFP storage racks. The licensee requests the physical inventory of the pellet-can be limited to a video inspection of the interior without disturbing the contents or requiring the movement of the pellet-can. The licensee requested that this exemption be granted and remain in effect until such time that the pellet-can is placed into an appropriate container, planned no later than December 31, 2010.

Section 74.19(c) requires that each licensee conduct a physical inventory of all special nuclear material (SNM) in its possession at intervals not to exceed 12 months. The requirement for a physical inventory of all SNM mandates that a visual accounting of all assemblies, rods, rod segments, rod pieces, and other structurally discrete parts that contain SNM be performed. This would require the loose fuel pellets and fuel fragments from Fuel Assembly D03 within the pellet-can to be visually verified during a physical inventory.

The proposed action would be to grant the licensee's exemption request as described above.

The Need for the Proposed Action

The NRC regulation 10 CFR 74.19(c) requires a licensee possessing special nuclear material, at any one time and site location, in a quantity greater than 350 grams of contained uranium-235, uranium-233, or plutonium, or any combination thereof, to conduct a physical inventory of all special nuclear material in its possession at intervals not to exceed 12 months. The licensee would have to move the pellet-can to a low dose area in the SFP in order to take radiation readings of the pellet-can's contents with a radiation monitor. Given the pellet-can's degraded condition and the means available to the licensee to move the pellet-can, there is a possible risk of dropping fuel pellets. The licensee is requesting that a video inspection of the interior of the pellet-can be considered a sufficient basis to verify that the contents have not been disturbed since the previous inspection.

The licensee's past inventory practices were limited to a visual verification that the pellet-can was in the location specified by the SNM inventory record database. The loose pellets and fuel fragments within the pellet-can were not visually verified. A physical inventory in accordance with 10 CFR 74.19(c) of the loose pellets and fuel fragments would require an effort to recover, separate and secure each loose pellet and fuel fragment from within the pellet-can. Undertaking this effort would impose a significant hardship and regulatory burden. The effort to visually verify SNM requires the

development of specialized tools and processes. Moreover, this effort may result in the potential spread of contamination within the SFP water. The filters have degraded over time and any recovery attempts may result in the possible discharge of fuel pellets or fuel fragments into the SFP. Further, removal of the loose pellets and fuel fragments from the container would be difficult as a result of this material (fuel pellets) being entangled within the filter medium.

Environmental Impacts of the Proposed Action

NRC has completed its safety evaluation of the proposed action and concludes that the underlying purposes of 10 CFR 74.19(c) is to ensure that SNM is properly accounted for, appropriately secured and authorities are informed of any theft, diversion, or loss. Allowing the licensee to address the physical inventory of the loose fuel pellets within the pellet-can by the use of a video inspection of the interior without disturbing the contents will assure that the SNM in the pellet-can is accounted for. Limiting the movement of the pellet-can will assure that, in its degraded condition, it will not fail and potentially allow the fuel pellets to become lost in the SFP. Therefore, there is no undue risk to public health and safety.

The details of the staff's safety evaluation will be provided in the exemption that will be issued as part of the letter to the licensee approving the exemption to the regulation.

The proposed action will not significantly increase the probability or consequences of accidents. No changes are being made in the types of effluents that may be released off site. Granting the proposed exemption request will not result in a significant increase in the amount of any effluent released off-site nor will it result in any significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential non-radiological impacts, the proposed action does not have a potential to cause effects on any historic properties. It does not affect non-radiological plant effluents and has no other environmental impact. Therefore, there are no significant non-radiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (i.e., the ''no-action'' alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

The action does not involve the use of any different resources than those previously considered in the ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 8 (Regarding McGuire Nuclear Station Units 1 and 2),'' NUREG–1437, dated December 2002.

Agencies and Persons Consulted

In accordance with its stated policy, on March 10, 2007, the staff consulted with the North Carolina State official, Dale Dusenbury of the North Carolina Department of Environment and Natural Resources, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated December 3, 2007. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or send an e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 12th day of March 2008.

For the Nuclear Regulatory Commission.

John Stang,

Senior Project Manager, Plant Licensing Branch II–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8–5383 Filed 3–17–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on the Medical Uses of Isotopes: Meeting Notice

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice of meeting.

SUMMARY: NRC will convene a meeting of the Advisory Committee on the Medical Uses of Isotopes (ACMUI) April 28–29, 2008. A sample of agenda items to be discussed during the public session includes: (1) ACMUI comments on the National Academies of Sciences report (*http://www.nap.edu/catalog.php?record_id=11976*); (2) ACMUI subcommittee recommendations on regulating the Leksell Gamma-Knife® Perfexion™; (3) potential revisions to the Abnormal Occurrence criteria; (4) subcommittee report on medical events and analysis of causes; (5) emerging technology; (6) yttrium 90 microsphere guidance; (7) status of active petitions for rulemaking; (8) NARM transition plan update; and (9) status of specialty board applications for NRC recognition. A copy of the agenda will be available at *http://www.nrc.gov/reading-rm/doc-collections/acmui/agenda* or by e-mailing Ms. Ashley M. Tull at the contact information below.

Purpose: Discuss issues related to 10 CFR Part 35 Medical Use of Byproduct Material.

Date and Time for Closed Sessions: April 28, 2008 from 3:30 p.m. to 5:30 p.m. This session will be closed so that NRC staff and ACMUI can prepare for the Commission meeting.

Date and Time for Open Sessions: April 28, 2008, from 8 a.m. to 3:30 p.m. and April 29, 2008, from 8 a.m. to 3 p.m.

Address for Public Meeting: U.S. Nuclear Regulatory Commission, Two White Flint North Building, Room T2–B3, 11545 Rockville Pike, Rockville, Maryland 20852.

Public Participation: Any member of the public who wishes to participate in the meeting should contact Ms. Tull using the information below.

Contact Information: Ashley M. Tull, e-mail: *amt1@nrc.gov*, telephone: (301) 415–5294 or (918) 488–0552.

Conduct of the Meeting

Leon S. Malmud, M.D., will chair the meeting. Dr. Malmud will conduct the meeting in a manner that will facilitate the orderly conduct of business. The following procedures apply to public participation in the meeting:

1. Persons who wish to provide a written statement should submit an electronic copy to Ms. Tull at the contact information listed above. All submittals must be received by April 21, 2008, and must pertain to the topic on the agenda for the meeting.

2. Questions and comments from members of the public will be permitted during the meeting, at the discretion of the Chairman.

3. The transcript will be available for inspection on ACMUI's Web site (*http://www.nrc.gov/reading-rm/doc-collections/acmui/tr/*) on or about July 28, 2008. Minutes of the meeting will be available on or about June 11, 2008.

4. Persons who require special services, such as those for the hearing impaired, should notify Ms. Tull of their planned attendance.

This meeting will be held in accordance with the Atomic Energy Act of 1954, as amended (primarily Section 161a); the Federal Advisory Committee Act (5 U.S.C. App); and the Commission's regulations in Title 10, *U.S. Code of Federal Regulations*, Part 7.

Dated: March 12, 2008.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. E8–5398 Filed 3–17–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Federal Register Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATE: Weeks of March 17, 24, 31, April 7, 14, 21, 2008.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of March 17, 2008

Monday, March 17, 2008

12:55 p.m. Affirmation Session (Public Meeting) (Tentative)

a. Final Rule—10

CFR Part 73 ''Safeguards Information Protection Requirements'' (Rin 3150 AH57) (Tentative).

b. Pa'ina Hawaii, LLC (Materials License Application) (Tentative).

c. Pa'ina Hawaii, LLC (Materials License Application) Atomic Safety and Licensing Board's Decision on Environmental Contentions (Dec. 21, 2007) (Tentative).

d. Pacific Gas and Electric Co. (Diablo Canyon ISFSI), Docket No.72–26-ISFSI, San Luis Obispo Mothers for Peace's Response to NRC Staff's Vaughn Index, Request for Leave to Conduct Discovery Against the NRC Staff, Request for Access to Unredacted Reference Documents, and Request for Procedures to Protect Submission of Sensitive Information (Tentative).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov*.

1 p.m. Briefing on State of NRC Technical Programs (Public Meeting). (Contact: Tamara Bloomer, 301 415–1725).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov*.

Tuesday, March 18, 2008

9:30 a.m. Briefing by Independent External Panel to Identify Vulnerabilities in the U.S. NRC's Materials Licensing Program (Public Meeting). (Contact: Aaron T. McCraw, 301–415–1277).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov*.

Week of March 24, 2008—Tentative

Thursday, March 27, 2008

9:30 a.m. Discussion of Management Issues (Closed—Ex. 2).

Week of March 31, 2008—Tentative

There are no meetings scheduled for the Week of March 31, 2008.

Week of April 7, 2008—Tentative

Monday, April 7, 2008

9:30 a.m. Briefing on Digital Instrumentation and Control (Public Meeting). (Contact: Steven Arndt, 301 415–6502).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov*.

Tuesday, April 8, 2008

10 a.m. Joint Meeting of the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission (NRC) (Public Meeting).

To be Held at FERC Headquarters, 888 First Street NE., Washington, DC. (Contact: Michelle Schroll, 301 415–1662).

This meeting will be Webcast live at the Web address—*http://www.ferc.gov*.

Wednesday, April 9, 2008

1 p.m. Discussion of Management Issues (Closed-Ex. 2).

Week of April 14, 2008 —Tentative

There are no meetings scheduled for the Week of April 14, 2008.

Week of April 21, 2008—Tentative

There are no meetings scheduled for the Week of April 21, 2008.

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*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

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The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html*.

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify the NRC's Disability Program Coordinator, Rohn Brown, at 301–492–2279, TDD: 301–415–2100, or by e-mail at *REB3@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov*.

Dated: March 13, 2008.

R. Michelle Schroll,

Office of the Secretary.

[FR Doc. 08–1045 Filed 3–14–08; 10:32 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Regulation S–X, SEC File No. 270,

OMB Control No. 3235–0009.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Information collected and information prepared pursuant to Regulation S–X focus on the form and content of, and requirements for, financial statements filed with periodic reports and in connection with the offer and sale of securities. Investors need reasonably current financial statements to make informed investment and voting decisions.

The potential respondents include all entities that file registration statements or reports pursuant to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) or the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*).

Regulation S–X specifies the form and content of financial statements when those financial statements are required to be filed by other rules and forms under the federal securities laws. Compliance burdens associated with the financial statements are assigned to the rule or form that directly requires the financial statements to be filed, not to Regulation S–X. Instead, an estimated burden of one hour traditionally has been assigned to Regulation S–X for incidental reading of the regulation. The estimated average burden hours are solely for purposes of the Paperwork Reduction Act and are not derived from a comprehensive or even a representative survey or study of the costs of SEC rules or forms.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*.

Dated: March 11, 2008.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–5356 Filed 3–17–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57481; File No. S7–966]

Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d–2; Notice of Filing and Order Approving and Declaring Effective an Amendment to the Plan for the Allocation of Regulatory Responsibilities Among the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Incorporated, the International Securities Exchange, LLC, Financial Industry Regulatory Authority, Inc., The NASDAQ Stock Market LLC, the New York Stock Exchange, LLC, NYSE Arca, Inc., and the Philadelphia Stock Exchange, Inc.

March 12, 2008.

Notice is hereby given that the Securities and Exchange Commission (''Commission'') has issued an Order, pursuant to Section 17(d) of the Securities Exchange Act of 1934 (''Act''),[1] approving and declaring effective an amendment to the plan for allocating regulatory responsibility filed pursuant to Rule 17d–2 of the Act,[2] by the American Stock Exchange LLC (''Amex''), the Boston Stock Exchange, Inc. (''BSE''), the Chicago Board Options Exchange, Incorporated (''CBOE''), the International Securities Exchange, LLC (''ISE''), Financial Industry Regulatory Authority, Inc. (''FINRA''), The NASDAQ Stock Market LLC (''NASDAQ''), the New York Stock Exchange (''NYSE''), NYSE Arca, Inc. (''NYSE Arca''), and the Philadelphia Stock Exchange, Inc. (''Phlx'') (collectively, ''SRO participants'').

I. Introduction

Section 19(g)(1) of the Act,[3] among other things, requires every self-regulatory organization (''SRO'') registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d)[4] or Section 19(g)(2)[5] of the Act. Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO (''common members''). Such regulatory duplication would add unnecessary expenses for common members and their SROs.

Section 17(d)(1) of the Act[6] was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication.[7] With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d–1 and Rule 17d–2 under the Act.[8] Rule 17d–1 authorizes the Commission to name a single SRO as the designated examining authority (''DEA'') to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules.[9] When an SRO has been named as a common member's DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. On its face, Rule 17d–1 deals only with an SRO's obligations to enforce member compliance with financial responsibility requirements. Rule 17d–1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the federal securities laws governing matters other than financial responsibility, including

[1] 15 U.S.C. 78q(d).

[2] 17 CFR 240.17d–2.

[3] 15 U.S.C. 78s(g)(1).

[4] 15 U.S.C. 78q(d).

[5] 15 U.S.C. 78s(g)(2).

[6] 15 U.S.C. 78q(d)(1).

[7] *See* Securities Act Amendments of 1975, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94–75, 94th Cong., 1st Session 32 (1975).

[8] 17 CFR 240.17d–1 and 17 CFR 240.17d–2, respectively.

[9] *See* Securities Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976).

sales practices and trading activities and practices.

To address regulatory duplication in these and other areas, the Commission adopted Rule 17d–2 under the Act.[10] Rule 17d–2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Under paragraph (c) of Rule 17d–2, the Commission may declare such a plan effective if, after providing for notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among the SROs, to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system, and is in conformity with the factors set forth in Section 17(d) of the Act. Commission approval of a plan filed pursuant to Rule 17d–2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

II. The Plan

On September 8, 1983, the Commission approved the SRO participants' plan for allocating regulatory responsibilities pursuant to Rule 17d–2.[11] On May 23, 2000, the Commission approved an amendment to the plan that added the ISE as a participant.[12] On November 8, 2002, the Commission approved another amendment that replaced the original plan in its entirety and, among other things, allocated regulatory responsibilities among all the participants in a more equitable manner.[13] On February 5, 2004, the parties submitted an amendment to the plan, primarily to include the BSE, which was establishing a new options trading facility to be known as the Boston Options Exchange (''BOX''), as an SRO participant.[14] On December 5, 2007, the parties submitted an amendment to the plan to, among other things, provide that the National Association of Securities Dealers (''NASD'') (n/k/a the Financial Industry Regulatory Authority, Inc. or ''FINRA'') and NYSE are Designated Options Examining Authorities under the plan.[15]

The plan reduces regulatory duplication for a large number of firms currently members of two or more of the SRO participants by allocating regulatory responsibility for certain options-related sales practice matters to one of the SRO participants. Generally, under the current plan, the SRO participant responsible for conducting options-related sales practice examinations of a firm, and investigating options-related customer complaints and terminations for cause of associated persons of that firm, is known as the firm's ''Designated Options Examining Authority'' (''DOEA''). Pursuant to the current plan, any other SRO of which the firm is a member is relieved of these responsibilities during the period in which the firm is assigned to another SRO acting as that firm's DOEA.

III. Proposed Amendment to the Plan

On December 27, 2007, the parties submitted a proposed amendment to the plan. The primary purpose of the amendment is to add NASDAQ as an SRO participant and to reflect the name change of NASD to FINRA. The amended agreement replaces the previous agreement in its entirety. The text of the proposed amended 17d–2 plan is as follows (additions are *italicized;* deletions are [bracketed]):

* * * * *

Agreement by and among the American Stock Exchange, LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the International Securities Exchange, LLC, *Financial Industry Regulatory Authority* [the National Association of Securities Dealers], Inc., the New York Stock Exchange, LLC, the NYSE Arca Inc., *The NASDAQ Stock Market LLC,* and the Philadelphia Stock Exchange, Inc., Pursuant to Rule 17d–2 under the Securities Exchange Act of 1934.

This agreement (''Agreement''), by and among the American Stock Exchange, LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the International Securities Exchange, LLC, *Financial Industry Regulatory Authority* [the National Association of Securities Dealers], Inc. (''*FINRA*[NASD]''), *The NASDAQ Stock Market LLC (''NASDAQ''),* the New York Stock Exchange, LLC (''NYSE''), the NYSE Arca, Inc., and the Philadelphia Stock Exchange, Inc., hereinafter collectively referred to as the Participants, is made this *27th*[1st] day of December, 200*7*[6], pursuant to the provisions of Rule 17d–2 under the Securities Exchange Act of 1934 (the ''Exchange Act''), which allows for plans among self-regulatory organizations to allocate regulatory responsibility. This Agreement shall be administered by a committee known as the Options Self-Regulatory Council (the ''Council'').

This Agreement amends and restates the agreement entered into among the Participants on December 1, 2006, entitled ''Agreement by and among the American Stock Exchange, LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the International Securities Exchange, LLC, National Association of Securities Dealers, Inc., the New York Stock Exchange, LLC, the NYSE Arca Inc., and the Philadelphia Stock Exchange, Inc., Pursuant to Rule 17d–2 under the Securities Exchange Act of 1934.''

Whereas, the Participants are desirous of allocating regulatory responsibilities with respect to broker-dealers, and persons associated therewith, that are members[†1] of more than one Participant (the ''Common Members'') and conduct a public business for compliance with Common Rules (as hereinafter defined) relating to the conduct by broker-dealers of accounts for listed options, index warrants, currency index warrants and currency warrants (collectively, ''Covered Securities''); and

Whereas, the Participants are desirous of executing a plan for this purpose pursuant to the provisions of Rule 17d–2 and filing such plan with the Securities and Exchange Commission (''SEC'' or the ''Commission'') for its approval;

Now, therefore, in consideration of the mutual covenants contained hereafter, the Participants agree as follows:

I. As used herein the term Designated Options Examining Authority (''DOEA'') shall mean *FINRA*[NASD] and NYSE insofar as each shall perform Regulatory Responsibility (as hereinafter defined) for its broker-dealer members that also are members of another Participant, and allocated to it in accordance with the terms hereof. The Designated Examination Authority (''DEA'') pursuant to SEC Rule 17d–1 under the Securities Exchange Act (''Rule 17d–1'') for a broker-dealer that is a member of a more than one Participant (but not a member of a DOEA) shall perform the Regulatory Responsibility under the

[10] *See* Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

[11] *See* Securities Exchange Act Release No. 20158 (September 8, 1983), 48 FR 41256 (September 14, 1983).

[12] *See* Securities Exchange Act Release No. 42816 (May 23, 2000), 65 FR 34759 (May 31, 2000).

[13] *See* Securities Exchange Act Release No. 46800 (November 8, 2002), 67 FR 69774 (November 19, 2002).

[14] *See* Securities Exchange Act Release No. 49197 (February 5, 2004), 69 FR 7046 (February 12, 2004).

[15] *See* Securities Exchange Act Release No. 55532 (March 26, 2007), 72 FR 15729 (April 2, 2007).

[†1] In the case of the Boston Stock Exchange, Inc., *and NASDAQ* members are those persons who are options participants (as defined in the BOX *and NASDAQ Options Market* Rules).

Agreement as if such DEA were the DOEA.

II. As used herein, the term ''Regulatory Responsibility'' shall mean the examination and enforcement responsibilities relating to compliance by broker-dealers that are members of more than one Participant (the ''Common Members'') with the rules of the applicable Participant that are substantially similar to the rules of the other Participants (the ''Common Rules''), insofar as they apply to the conduct of accounts for Covered Securities. A list of the current Common Rules of each Participant applicable to the conduct of accounts for Covered Securities is attached hereto as Exhibit A. Each year within 30 days of the anniversary date of the commencement of operation of this Agreement, each Participant shall submit in writing to each DOEA and DEA performing as a DOEA for any members of such Participant any revisions to Exhibit A reflecting changes in the rules of the Participant or DOEAs, and confirm that all other rules of the Participant listed in Exhibit A continue to meet the definition of Common Rules as defined in this Agreement. Within 30 days from the date that each DOEA has received revisions and/or confirmation that no change has been made to Exhibit A from all Participants, the DOEAs shall confirm in writing to each Participant whether the rules listed in any updated Exhibit A are Common Rules as defined in this Agreement. Notwithstanding anything herein to the contrary, it is explicitly understood that the term ''Regulatory Responsibility'' does not include, and each of the Participants shall (unless allocated pursuant to Rule 17d–2 otherwise than under this Agreement) retain full responsibility for, each of the following:

(a) Surveillance and enforcement with respect to trading activities or practices involving its own marketplace, including without limitation its rules relating to the rights and obligations of specialists and other market makers;

(b) Registration pursuant to its applicable rules of associated persons;

(c) Discharge of its duties and obligations as a DEA; and

(d) Evaluation of advertising, responsibility for which shall remain with the Participant to which a Common Member submits same for approval.

III. Apparent violations of another Participant's rules discovered by a DOEA, but which rules are not within the scope of the discovering DOEA's Regulatory Responsibility, shall be referred to the relevant Participant for such action as the Participant to which such matter has been referred deems appropriate. Notwithstanding the foregoing, nothing contained herein shall preclude a DOEA in its discretion from requesting that another Participant conduct an enforcement proceeding on a matter for which the requesting DOEA has Regulatory Responsibility. If such other Participants agree, the Regulatory Responsibility in such case shall be deemed transferred to the accepting Participant. Each Participant agrees, upon request, to make available promptly all relevant files, records and/or witnesses necessary to assist another Participant in an investigation or enforcement proceeding.

IV. The Council shall be composed of one representative designated by each of the Participants. Each Participant shall also designate one or more persons as its alternate representative(s). In the absence of the representative of a Participant, such alternate representative shall have the same powers, duties and responsibilities as the representative. Each Participant may, at any time, by notice to the then Chair of the Council, replace its representative and/or its alternate representative on such Council. A majority of the Council shall constitute a quorum and, unless specifically otherwise required, the affirmative vote of a majority of the Council members present (in person, by telephone or by written consent) shall be necessary to constitute action by the Council. From time to time, the Council shall elect one member from the DOEAs to serve as Chair and another from the Council to serve as Vice Chair (to substitute for the Chair in the event of his or her unavailability at a meeting of the Council). All notices and other communications for the Council shall be sent to it in care of the Chair or to each of the representatives.

V. The Council shall determine the times and locations of Council meetings, provided that the Chair, acting alone, may also call a meeting of the Council in the event the Chair determines that there is good cause to do so. To the extent reasonably possible, notice of any meeting shall be given at least ten-business days prior thereto. Notwithstanding anything herein to the contrary, representatives shall always be given the option of participating in any meeting telephonically at their own expense rather than in person.

VI. For the purpose of fulfilling the Participants' Regulatory Responsibilities, the DOEAs shall allocate Common Members that conduct a public business in Covered Securities among DOEAs from time to time in such manner as the DOEAs deem appropriate, provided that any such allocation shall be based on the following principles except to the extent affected DOEAs consent:

(a) The DOEAs may not allocate a member to a DOEA unless the member is a member of that DOEA, nor shall any member be allocated to a Participant that is not a DOEA or DEA acting as a DOEA.

(b) To the extent practical and desired by the DOEAs, Common Members that conduct a public business in Covered Securities shall be allocated among the DOEAs of which they are members in such manner as to equalize as nearly as possible the allocation of such Common Members among such DOEAs.

(c) To the extent practical and desired by the DOEAs, the allocation of Common Members shall take into account the amount of customer activity conducted by each member in Covered Securities such that Common Members shall be allocated among the DOEAs of which they are members in such manner as most evenly divides the Common Members with the largest amount of customer activity among such DOEAs.

(d) The DOEAs shall make general reallocations of Common Members from time-to-time, as it deems appropriate.

(e) All Participants shall promptly notify the DOEAs no later than the next scheduled meeting of any change in membership of Common Members. Whenever a Common Member ceases to be a member of its DOEA, that DOEA shall promptly inform the other DOEAs, which will promptly review the matter and reallocate the Common Member to the extent practical.

(f) A DOEA may request that a Common Member that is allocated to it be reallocated to another DOEA by giving thirty days written notice thereof. The DOEAs in their discretion may approve such request and reallocate such Common Member to another DOEA.

(g) All determinations by the DOEAs with respect to allocations, if there are more than two DOEAs, shall be by the affirmative vote of a majority of the DOEAs of which such firm is a Common Member, otherwise by negotiation and consensus.

VII. Each DOEA shall conduct an examination of each Common Member allocated to it on a cycle not less frequently than agreed upon by all DOEAs. The other Participants agree that, upon request, relevant information in their respective files relative to a Common Member will be made available to the applicable DOEA. At each meeting of the Council, each DOEA shall be prepared to report on the status

of its examination program for the previous quarter and any period prior thereto that has not previously been reported to the Council. In the event a DOEA believes it will not be able to complete the examination cycle for its allocated firms, it will so advise the Council. The DOEAs may undertake to remedy this situation by reallocating selected firms or lengthening the cycles for selected firms, with the approval of all other DOEAs.

VIII. Each DOEA will promptly furnish a copy of the Examination report, relating to Covered Securities, of any examination made pursuant to the provisions of this Agreement to each other Participant of which the Common Member examined is a member.

IX. Each DOEA's Regulatory Responsibility shall for each Common Member allocated to it include investigations into terminations ''for cause'' of associated persons relating to Covered Securities, unless such termination is related solely to another Participant's market. In the latter instance, that Participant to whose market the termination for cause relates shall discharge Regulatory Responsibility with respect to such termination for cause. In connection with a DOEA's examination, investigation and/or enforcement proceeding regarding a Covered Security-related termination for cause, the other Participants of which the Common Member is a member shall furnish, upon request, copies of all pertinent materials related thereto in their possession. As used in this Section, ''for cause'' shall include, without limitation, terminations characterized on Form U5 under the label ''Permitted to Resign,'' ''Discharge'' or ''Other.''

X. Each DOEA shall discharge the Regulatory Responsibility for each Common Member allocated to it relative to a Covered Securities-related customer complaint [†2] unless such complaint is uniquely related to another Participant's market. In the latter instance, the DOEA shall forward the matter to that Participant to whose market the matter relates, and the latter shall discharge Regulatory Responsibility with respect thereto. If a Participant receives a customer complaint for a Common Member related to a Covered Security for which the Participant is not the DOEA, the Participant shall promptly forward a copy of such complaint to the DOEA.

[†2] For purposes of complaints, they can be reported pursuant to Form U4, Form U5 or RE–3 and any amendments thereto.

XI. Any written notice required or permitted to be given under this Agreement shall be deemed given if sent by certified mail, return receipt requested, or by a comparable means of electronic communication to each Participant entitled to receipt thereof, to the attention of the Participant's representative on the Council at the Participant's then principal office or by e-mail at such address as the representative shall have filed in writing with the Chair.

XII. The Participants shall notify the Common Members of this Agreement by means of a uniform joint notice approved by the Council.

XIII. This Agreement may be amended in writing duly approved by each Participant.

XIV. Any of the Participants may manifest its intention to cancel its participation in this Agreement at any time by giving the Council written notice thereof at least 90 days prior to the effective date of such cancellation. Upon receipt of such notice the Council shall allocate, in accordance with the provisions of this Agreement, any Common Members for which the petitioning party was the DOEA. Until such time as the Council has completed the reallocation described above; the petitioning Participant shall retain all its rights, privileges, duties and obligations hereunder.

XV. The cancellation of its participation in this Agreement by any Participant shall not terminate this Agreement as to the remaining Participants. This Agreement will only terminate following notice to the Commission, in writing, by the then Participants that they intend to terminate the Agreement and the expiration of the applicable notice period. Such notice shall be given at least six months prior to the intended date of termination, provided that in the event a notice of cancellation is received from a Participant that, assuming the effectiveness thereof, would result in there being just one remaining member of the Council, notice to the Commission of termination of this Agreement shall be given promptly upon the receipt of such notice of cancellation, which termination shall be effective upon the effectiveness of the cancellation that triggered the notice of termination to the Commission.

Limitation of Liability

No Participant nor the Council nor any of their respective directors, governors, officers, employees or representatives shall be liable to any other Participant in this Agreement for any liability, loss or damage resulting from or claimed to have resulted from any delays, inaccuracies, errors or omissions with respect to the provision of Regulatory Responsibility as provided hereby or for the failure to provide any such Responsibility, except with respect to such liability, loss or damages as shall have been suffered by one or more of the Participants and caused by the willful misconduct of one or more of the other participants or their respective directors, governors, officers, employees or representatives. No warranties, express or implied, are made by any or all of the Participants or the Council with respect to any Regulatory Responsibility to be performed by each of them hereunder.

Relief From Responsibility

Pursuant to Section 17(d)(1)(A) of the Securities Exchange Act of 1934 and Rule 17d–2 promulgated pursuant thereto, the Participants join in requesting the Securities and Exchange Commission, upon its approval of this Agreement or any part thereof, to relieve those Participants which are from time to time participants in this Agreement which are not the DOEA as to a Common Member of any and all Regulatory Responsibility with respect to the matters allocated to the DOEA.

Exhibit A—Rules Enforced Under 17d–2 Agreement Opening of Accounts

AMEX Rules 411, 921 and 1101
CBOE Rule 9.7
ISE Rule 608
FINRA NASD Rules 2860(b)(16), IM–2860–2 & 2843
NYSE Rule 721
PHLX Rule 1024(b)
NYSE ARCA Rule 9.2(a) and Rule 9.18(b)
BSE/BOX Chapter XI, Section 9
NASDAQ Chapter XI, Section 7

Supervision

AMEX Rules 411, 922 & 1104
CBOE Rule 9.8
ISE Rule 609
FINRA NASD Rules 2860(b)(20), 2860(b)(17)(B), 2846 & 2849
NYSE Rule 722
PHLX Rule 1025
NYSE ARCA Rule 9.2(b)
BSE/BOX Chapter XI, Section 10
NASDAQ Chapter XI, Section 8

Suitability

AMEX Rules 923 & 1102
CBOE Rule 9.9
ISE Rule 610
FINRA NASD Rule 2860(b)(19) & 2844
NYSE Rule 723
PHLX Rule 1026
NYSE ARCA Rule 9.18(c)
BSE/BOX Chapter XI, Section 11

NASDAQ Chapter XI, Section 9

Discretionary Accounts

AMEX Rules 421, 924 & 1103
CBOE Rule 9.10
ISE Rule 611
FINRA NASD Rules 2860(b)(18) & 2845
NYSE Rules 724 & 414
PHLX Rule 1027
NYSE ARCA Rule 9.18(e)
BSE/BOX Chapter XI, Section 12
NASDAQ Chapter XI, Section 10

Customer Communications (Advertising)

AMEX Rules 480, 481, 991 & 1106
CBOE Rule 9.21
ISE Rule 623
FINRA NASD Rules 2220 & 2848
NYSE Rule 791
PHLX Rule 1049
NYSE ARCA Rule 9.22(a)
BSE/BOX Chapter XI, Section 24
NASDAQ Chapter XI, Section 22

Customer Complaints

AMEX Rules 932 and 1105
CBOE Rule 9.23
ISE Rule 625
FINRA NASD Rules 2860(b)(17)(A), 3070(a) & (c) & 2847
NYSE Rules 732 & 351(a) and (d)
PHLX Rule 1070
NYSE ARCA Rule 9.18(I)
BSE/BOX Chapter XI, Section 26
NASDAQ Chapter XI, Section 24

Customer Statements

AMEX Rules 419 and 930
CBOE Rule 9.12
ISE Rules 613 and 614
FINRA NASD Rule 2860(b)(15)
NYSE Rules 730 & 409(a)
PHLX Rule 1032
NYSE ARCA Rule 9.18(j)
BSE/BOX Chapter XI, Sections 14 and 15
NASDAQ Chapter XI, Sections 12 and 13

Confirmations

AMEX Rule 925
CBOE Rule 9.11
ISE Rule 612
FINRA NASD Rule 2860(b)(12)
NYSE Rules 725 & 409(b)
PHLX Rule 1028
NYSE ARCA Rule 9.18(f)
BSE/BOX Chapter XI, Section 13
NASDAQ Chapter XI, Section 11

Allocation of Exercise Assignment Notices

AMEX Rule 981
CBOE Rule 11.2
ISE Rule 1101
FINRA NASD Rule 2860(b)(23)
NYSE Rule 781
PHLX Rule 1043
NYSE ARCA Rule 6.25(a)
BSE/BOX Chapter VII, Section 2
NASDAQ Chapter VIII, Section 2

Disclosure Documents

AMEX Rules 921 and 926
CBOE Rule 9.15
ISE Rule 616
FINRA NASD Rule 2860(b)(11)
NYSE Rule 726 (a) and (c)
PHLX Rule 1024(b)(v), 1029
NYSE ARCA Rule 9.18(g)
BSE/BOX Chapter XI, Section 17
NASDAQ Chapter XI, Section 15

Branch Offices of Member Organizations

AMEX Rule 320
CBOE Rule 9.6
ISE Rule 607
FINRA NASD Rule 2860(b)(20)(c) & 2846
NYSE Rule 722(d)
PHLX Rule 602
NYSE ARCA Rule 9.18(m)
BSE/BOX Chapter XI, Section 8
NASDAQ Chapter XI, Section 6

Prohibition Against Guarantees

AMEX Rule 341
CBOE Rule 9.18
ISE Rules 619 and 620
FINRA NASD Rule 2330(e)
NYSE Rule 352(a)
PHLX Rule 777
NYSE ARCA Rule 9.1(e)
BSE/BOX Chapter XI, Sections 20 and 21
NASDAQ Chapter XI, Sections 18 and 19

Assuming Losses

AMEX Rule 16
CBOE Rule 9.19
ISE Rule 621
FINRA NASD Rule 2330(f)
NYSE Rules 352 (b) and (c)
PHLX Rule 777
NYSE ARCA Rule 9.1(f)
BSE/BOX Chapter XI, Section 22
NASDAQ Chapter XI, Section 20

Registration of ROP

AMEX Rule 920
CBOE Rule 9.2
ISE Rule 601
FINRA NASD Rules 1022(f) & IM–1022–1
NYSE Rule 720
PHLX Rule 1024
NYSE ARCA Rule 9.26
BSE/BOX Chapter XI, Section 2
NASDAQ Chapter XI, Section 2

Certification of Registered Personnel

Amex Rule 920
CBOE Rule 9.3
ISE Rule 602
FINRA NASD Rule 1032(d)
NYSE Rule 345
PHLX Rule 1024
NYSE ARCA Rule 9.27(a)
BSE/BOX Chapter XI, Section 3
NASDAQ Chapter XI, Section 3

IV. Solicitation of Comments

In order to assist the Commission in determining whether to approve the 17d–2 plan, interested persons are invited to submit written data, views, and arguments concerning the foregoing. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–966 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–966. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/other.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan that are filed with the Commission, and all written communications relating to the proposed plan between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the plan also will be available for inspection and copying at the principal offices of Amex, BSE, CBOE, ISE, FINRA, NASDAQ, NYSE, NYSE Arca, and the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number S7–966 and should be submitted on or before April 7, 2008.

V. Discussion

The Commission continues to believe that the proposed plan is an achievement in cooperation among the SRO participants, and will reduce unnecessary regulatory duplication by allocating to the designated SRO the responsibility for certain options-related sales practice matters that would otherwise be performed by multiple SROs. The plan promotes efficiency by reducing costs to firms that are members of more than one of the SRO participants. In addition, because the SRO participants coordinate their regulatory functions in accordance with the plan, the plan promotes, and will continue to promote, investor protection.

Under paragraph (c) of Rule 17d–2, the Commission may, after appropriate notice and comment, declare a plan, or any part of a plan, effective. In this instance, the Commission believes that appropriate notice and comment can take place after the proposed amendment is effective. The primary purpose of the amendment is to add NASDAQ as an SRO participant and to reflect the name change of NASD to FINRA. By declaring it effective today, the amended plan can become effective and be implemented concurrently with the Commission's approval of NASDAQ's new options facility, the NASDAQ Options Market.[16] In addition, the Commission notes that the prior version of this plan immediately prior to this proposed amendment was published for comment and the Commission did not receive any comments thereon.[17] Finally, the Commission does not believe that the amendment to the plan raises any new regulatory issues that the Commission has not previously considered.

VI. Conclusion

This order gives effect to the amended plan submitted to the Commission that is contained in File No. S7–966.

It is therefore ordered, pursuant to Section 17(d) of the Act,[18] that the amended plan dated December 27, 2007 by and between the Amex, BSE, CBOE, ISE, FINRA, NASDAQ, NYSE, NYSE Arca, and Phlx filed pursuant to Rule 17d–2 is hereby approved and declared effective.

It is further ordered that those SRO participants that are not the DOEA as to a particular common member are relieved of those regulatory responsibilities allocated to the common member's DOEA under the amended plan to the extent of such allocation.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Nancy M. Morris,

Secretary.

[FR Doc. E8–5321 Filed 3–17–08; 8:45 am]

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[16] *See* Securities Exchange Act Release No. 57478 (March 12, 2008) (SR–NASDAQ–2007–004) (SR–NASDAQ–2007–080).

[17] *See supra* note 15 (citing to Securities Exchange Act Release No. 55532).

[18] 15 U.S.C. 78q(d).

[19] 17 CFR 200.30–3(a)(34).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57483; File No. SR–Amex–2008–22]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Widen the Spread Tolerances and Eliminate the Momentum Tolerances Built Into the AEMI System

March 12, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 11, 2008, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared substantially by the Amex. The Amex has submitted the proposed rule change under Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to amend Amex Rules 1A—AEMI, ''Applicability, Definitions, References and Phase-In,'' and 128A—AEMI, ''Automatic Execution,'' to reflect the widening of the spread tolerances and the elimination of the momentum tolerances built into the AEMI system. The Amex believes that these changes are necessary to enable the automated execution of orders and quotes (''Auto-Ex'') to occur more continuously on the Exchange, without unnecessary interruption.

The text of the proposed rule change is available at *http://www.amex.com*, the principal office of the Amex, and the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Spread and momentum tolerances are built into AEMI whereby if the difference in price of any two consecutive executions (spread) or velocity of price changes over a specific time window (momentum) in any particular security exceed certain thresholds—a ''breach''—Auto-Ex is disabled in that security.[5] Upon a breach, an Amex specialist would conduct an intra-day pair-off before Auto-Ex is restored. The Amex now believes that the tolerances, in their current form, are no longer essential to the proper functioning of an automated market, given that Regulation NMS[6] ensures price protection for automated quotations in other market centers that are priced better than the Amex top of book. Further, the Amex believes that the tolerances in their current form have not necessarily been effective in dampening price volatility (in contrast to Amex specialists' obligations to maintain reasonable depth with price continuity). The Amex also notes that its competitors, Nasdaq and NYSE Arca, do not impose such limitations on Auto-Ex in their markets.[7] Accordingly, the Amex believes that the time has come to modify its systems so that Auto-Ex can occur more continuously, without

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Rule 128A—AEMI(f)(i)–(ii).

[6] 17 CFR 242.600 *et seq.*

[7] The Amex states that New York Stock Exchange Rule 1000(a)(iv) specifies that Auto-Ex will disable when a ''liquidity replenishment point'' is reached. According to the Amex, a liquidity replenishment point is a type of spread tolerance. The Amex states, further, that the NYSE does not have anything equivalent to a momentum tolerance.

unnecessary interruptions by breaches, and believes that market quality will not be compromised by such changes.

The proposed changes would double the existing spread tolerances, and eliminate the momentum tolerances,[8] so that the automatic execution of trades by AEMI could occur more continuously during the trading day. The Amex states that Auto-Ex would be shut down only if: (i) There were a breach of a Tolerance (as re-defined by the proposal in Rule 128A—AEMI(g)); (ii) a systems, regulatory, or order imbalance issue required a halt to automatic trading, whereupon Auto-Ex would be re-enabled by the specialist via auction pair-off or re-opening pair-off, as per current practice; or (iii) if all liquidity on either side of the market in a particular security were momentarily exhausted, whereupon a non-firm stabilizing quote would be maintained until the specialist updated his firm quote, as per current practice.[9]

2. Statutory Basis

The Amex believes that the proposed rule change is designed to be consistent with Regulation NMS, as well as Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Amex believes that the proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

II. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Amex has designated the proposed rule change as one that: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Therefore, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[12] and Rule 19b–4(f)(6) thereunder.[13]

The Amex has requested that the Commission waive the 30-day operative delay. The Commission hereby grants the Amex's request.[14] The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because other exchanges already operate in a manner proposed herein for AEMI, and the Amex's proposal does not appear to present any novel regulatory issues.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Amex–2008–22 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Amex–2008–22. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–Amex–2008–22 and should be submitted on or before April 8, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–5427 Filed 3–17–08; 8:45 am]

BILLING CODE 8011–01–P

[8] The Amex states that the ''elimination'' of the momentum tolerance (Rule 128A—AEMI(f)(ii)) will be accomplished systemically by re-setting the parameters programmed into AEMI at extreme values that should never be encountered, rather than eliminating the concept itself from AEMI, which would be a substantially more difficult system change.

[9] *See* Rule 1A—AEMI (defining stabilizing quote).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Amex to provide the Commission with written notice of its intention to file the proposed rule change, along with a brief description of the text of the proposed rule change, at least five business days prior to filing the proposal with the Commission, or such shorter time as designated by the Commission. The Commission has determined to waive the five-day period in this case.

[14] For purposes of waiving the 30-day operative delay, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57470; File No. SR–CBOE–2008–23]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Hybrid Agency Liaison Step-Up Rebate Program

March 11, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 29, 2008, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by CBOE. CBOE has designated this proposal as one establishing or changing a due, fee, or other charge applicable only to a member under Section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to amend the Hybrid Agency Liaison (''HAL'') step-up rebate program. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In January 2008, in order to incent market makers to execute orders at CBOE versus routing orders away via the Intermarket Options Linkage (''Linkage''), the Exchange established a program whereby the Exchange provides a rebate to market-makers that ''step-up'' and trade all or part of certain orders on the HAL system.[5] Specifically, the Exchange rebates to a market-maker $.20 per contract against transaction fees generated from a transaction on the HAL system in a penny pilot class, provided that at least 80% of the market-maker's quotes in that class (excluding quotes in LEAPS series) in that same month were on one side of the national best bid or offer (''NBBO'') price. Market-makers not meeting this 80% qualifying threshold are not eligible to receive a rebate. The HAL rebate program allows market-makers to compete better for order flow in the penny pilot classes.

The Exchange proposes to amend the program in two respects effective March 1, 2008. First, the Exchange proposes to reduce the qualifying threshold from 80% of a market-maker's quotes in a class to 60%. Second, the Exchange proposes to change the qualifying time period from the same month in which the rebate is given to the calendar month prior to the month in which the rebate is given. Thus, for example, if at least 60% of a market-maker's quotes in a penny pilot class (excluding quotes in LEAPS series) in February 2008 were on one side of the NBBO, the market-maker would be eligible to receive the rebate for all of the market-maker's HAL transactions in that class in March 2008.

The proposed reduction in the qualifying threshold is intended to further incent market-makers to execute orders in penny pilot classes at CBOE instead of routing those orders away via the Linkage. The proposed change in the qualifying period is intended to make the program easier for members to administer because members will know going into a given month whether or not their HAL executions that month will qualify for the rebate.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act[6] in general and furthers the objectives of Section 6(b)(4)[7] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and subparagraph (f)(2) of Rule 19b–4[9] thereunder because it establishes or changes a due, fee, or other charge applicable only to a member. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2008–23 on the subject line.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See* Securities Exchange Act Release No. 57231 (January 30, 2008), 73 FR 6752 (February 5, 2008). HAL is a system for automated handling of electronically received orders that are not automatically executed upon receipt by the Hybrid Trading System. CBOE Rule 6.14 governs the operation of the HAL system.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

Paper Comments

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2008–23. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m.. Copies of such filing also will be available for inspection and copying at the principal office of CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2008–23 and should be submitted on or before April 8, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–5353 Filed 3–17–08; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57472; File No. SR–CBOE–2008–24]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Regarding the CBOE Stock Exchange Market Data Infrastructure Fee

March 11, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 7, 2008, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. On March 11, 2008, the Exchange filed Amendment No. 1 to the proposed rule change. The Exchange has designated this proposal as one establishing a due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the CBOE Stock Exchange (''CBSX'') market data infrastructure fee. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange charges CBSX market participants a monthly fee to recoup the fees CBSX pays a third-party market data vendor and other parties to help establish facilities at CBSX through which the third-party market data vendor can provide CBSX participants with certain market data.[5] Currently, the amount of the fee is equal to $19,400 divided by the number of CBSX participants receiving the market data. Recently, the Exchange's costs to provide this infrastructure have increased. To help compensate CBSX for its increased costs in providing this infrastructure, the Exchange proposes to increase the fee to $20,400 divided by the number of CBSX participants receiving the market data.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act[6] in general, and furthers the objectives of Section 6(b)(4) of the Act[7] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members. The Exchange believes the proposed fee will help allocate to each CBSX market participant receiving market data through this infrastructure a fair share of CBSX's costs for providing this infrastructure.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See* Securities Exchange Act Release No. 55882 (June 8, 2007), 72 FR 32931 (June 14, 2007) (SR–CBOE–2007–54); and Securities Exchange Act Release No. 56231 (August 9, 2007), 72 FR 46118 (August 16, 2007) (SR–CBOE–2007–73).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective upon filing pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(2) thereunder.[9] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[10]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–CBOE–2008–24 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2008–24. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commissions Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2008–24 and should be submitted on or before April 8, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–5354 Filed 3–17–08; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 19b–4(f)(2).

[10] For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on March 11, 2008, the date on which the Exchange filed Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57479; File No. SR–CHX–2008–03]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change To Amend Rules Relating to Fingerprinting

March 12, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 26, 2008, the Chicago Stock Exchange, Inc. (''CHX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the CHX. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CHX proposes to amend its rules relating to the fingerprinting of Exchange staff and other persons. The text of this proposed rule change is available at the Exchange, the Commission's Public Reference Room, and at *http://www.chx.com/content/Participant_Information/Rules_Filings.html*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CHX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

As part of its trading model rule set, the Exchange included a fingerprint rule that requires the Exchange to conduct fingerprint-based background checks of Exchange staff, certain independent contractors and other persons that have regular access to the Exchange's facilities and premises.[3] The Exchange seeks to amend this rule to remove any requirement that the Exchange conduct these fingerprint-based background checks. The Exchange believes that, where appropriate, it can conduct necessary background checks of staff and consultants through more efficient means. This proposal has no impact on the fingerprinting obligations that apply to Exchange participants and participant firm personnel. The Exchange will continue to require its participants to adhere to applicable fingerprinting obligations.[4]

2. Statutory Basis

The CHX believes the proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[5] The proposed rule change is consistent with Section 6(b)(5) of the Act[6] because it would promote just and equitable principles of trade, remove impediments to, and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Article 6, Rule 10(b) of the Exchange's Rules.

[4] *See* Article 6, Rule 10(a) of the Exchange's Rules; *see also* Section 17(f)(2) of the Act (15 U.S.C. 78q(f)(2)) and Rule 17f–2 thereunder (17 CFR 240.17f–2).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest by allowing the Exchange the flexibility to conduct background checks of staff, independent contractors and other persons using the means deemed most efficient by Exchange management.

B. Self-Regulatory Organization's Statement of Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such other period: (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–CHX–2008–03 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–CHX–2008–03. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the CHX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–CHX–2008–03 and should be submitted on or before April 8, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–5426 Filed 3–17–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57474; File No. SR–FINRA–2008–001]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change Relating to Amendments to FINRA's Gross Income Assessment and Technical Changes to Schedule A to FINRA's By-Laws

March 11, 2008.

I. Introduction

On January 10, 2008, the Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD''))[1] filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] a proposed rule change to amend Schedule A to the FINRA By-Laws to amend the Gross Income Assessment (''GIA'') paid by each FINRA member and to update the references to NASD that appear in Schedule A to the FINRA By-Laws. The proposed rule change was published for comment in the **Federal Register** on February 7, 2008.[4] The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

On July 30, 2007, NASD and the NYSE consolidated their member firm regulation operations into a combined organization, FINRA. The proposed rule change seeks to consolidate certain regulatory fees imposed by NASD and NYSE that will be applied retroactively to January 1, 2008. FINRA will announce this fee change in a *Regulatory Notice*.

FINRA's member regulatory pricing structure currently consists primarily of the following fees: the GIA; The Trading Activity Fee (''TAF''); the Personnel Assessment (''PA''); and the Branch Office Assessment (''BOA''). As part of the consolidation, NYSE committed to transfer to FINRA certain regulatory revenues for the remainder of 2007.[5] NYSE fees subject to the transfer agreement include a gross FOCUS (Financial and Operational Combined Uniform Single Report) fee (''GFF'')[6]

[7] 17 CFR 200.30–3(a)(12).

[1] On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to the Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and New York Stock Exchange Regulation, Inc. (''NYSE''). *See* Securities Exchange Act Release No. 56145 (July 26, 2007), 72 FR 42169 (August 1, 2007).

[2] 15 U.S.C. 78s(b)(1).

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 57259 (February 1, 2008), 73 FR 7340 (''Notice'').

[5] *See* Securities Exchange Act Release No. 56181 (August 1, 2007); 72 FR 44206 (August 7, 2007) (Notice of Filing and Immediate Effectiveness of SR–NYSE–2007–70).

[6] The GFF is comparable to FINRA's GIA. *See* Section 1(c) of Schedule A of FINRA By-Laws.

and registration fees for branch offices[7] and registered representatives.[8]

FINRA now proposes to: (1) Eliminate NYSE's legacy registration fees for branch offices and registered representatives, which totals approximately $18.6 million in fee reductions;[9] (2) maintain FINRA's fee structures and levels for the TAF, the BOA and the PA; and (3) consolidate, with certain adjustments, FINRA's GIA rate structure with NYSE's GFF rate structure.[10]

The GIA is currently assessed through a three-tier rate structure with a minimum GIA of $1,200.00. Under the current GIA, members are required to pay an annual GIA equal to the greater of $1,200.00 or the total of: (1) 0.125% of annual gross revenue less than or equal to $100 million; (2) 0.029% of annual gross revenue greater than $100 million up to $1 billion; and (3) 0.014% of annual gross revenue greater than $1 billion.[11] In contrast, the legacy GFF was assessed at a flat rate of $0.42 per $1,000 of gross FOCUS revenue (or 0.042%).

To consolidate these two legacy fees, FINRA proposes to retain the minimum assessment under the GIA of $1,200.00, with the ceiling increased from $960,000.00 to $1 million of annual assessable revenue. Because FINRA has committed to reduce the GIA by $1,200.00 per year for five years, subject to annual approval by FINRA's Board of Directors, the proposal will effectively reduce the GIA to $0 for the first $1 million of annual assessable revenue. For annual gross revenue over $1 million, the regressive rate structure of the legacy GIA and the flat rate structure of the legacy GFF will be combined into a new seven-tiered rate structure. Under the proposed rule change, members will be assessed a GIA of:

(1) $1,200 on annual gross revenue up to $1 million;

(2) 0.1215% of annual gross revenue greater than $1 million up to $25 million;

(3) 0.2599% of annual gross revenue greater than $25 million up to $50 million;

(4) 0.0518% of annual gross revenue greater than $50 million up to $100 million;

(5) 0.0365% of annual gross revenue greater than $100 million up to $5 billion;

(6) 0.0397% of annual gross revenue greater than $5 billion up to $25 billion; and

(7) 0.0855% of annual gross revenue greater than $25 billion.

The new rate structure will be implemented over a three-year period beginning in 2008. During this period, the change in the GIA paid to FINRA by each member will be subject to a cap based on the fees that the member would have paid under the prior NASD and NYSE rate structures. In 2008, a member's GIA will not be impacted by the new rate structure. In 2009, any increase or decrease to the member's GIA resulting from the new rate structure will be capped at a five percent increase or decrease. In 2010, any increase or decrease to the member's GIA resulting from the new rate structure will be capped at a ten percent increase or decrease. During this implementation period, a firm's GIA may increase or decrease due to a change in the member's assessable revenue from year to year; however, any changes to the firm's GIA that result from the change in rate structure will be subject to the cap.

For firms that were members of NASD only (not NYSE) as of July 30, 2007, the cap will be calculated based upon the GIA that the member firm would have paid under the prior NASD GIA rate structure. For firms that became, or become, FINRA members on or after July 30, 2007 (excluding those firms that were members of NYSE only as of July 30, 2007, and were subsequently required to become FINRA members pursuant to NYSE Rule 2), the cap will be calculated based upon the GIA that the member firm would have paid under the prior NASD GIA rate structure. For firms that were members of the NYSE only (not NASD) as of July 30, 2007, the cap will be calculated based upon the NYSE GFF that the member would have paid under the prior NYSE GFF rate structure.[12] For firms that were members of both NASD and the NYSE as of July 30, 2007 (''Dual Members''), the cap will be calculated based upon the GIA and the GFF that the member would have paid under the prior NASD GIA rate structure and the prior NYSE GFF rate structure.[13]

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities association.[14] Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(5) of the Act[15] in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls.

The proposed rule change creates a single fee structure for FINRA that avoids duplicative fees charged by both FINRA and NYSE. Specifically, the proposed rule change creates a seven-tiered rate structure that balances NASD's legacy GIA tiered rate structure with NYSE's legacy GFF flat rate structure. FINRA represents that the proposed rule change will result in aggregate fee reductions of approximately $25 million dollars in 2008 and forward. FINRA estimates that, under the proposed rate structure, 93 percent of member firms will have either no change to their GIA or a reduced GIA due to this new rate structure. In addition, to minimize the impact on members, the new rate structure will be implemented over a three-year period beginning in 2008. Despite the reduction in revenue that will result from the new rate structure, FINRA also represents that the revenue collected under the proposal will adequately fund its member regulatory programs, including the regulation of members through examination, policymaking, rulemaking and enforcement activities. Accordingly, the Commission believes that the proposed rule change is consistent with the Act.

[7] *See* NYSE Rule 342, Supplementary Material .11. NYSE's registration fee for branch offices is comparable to FINRA's Branch Office System Processing Fee. *See also* Section 4(a) of Schedule A of FINRA By-Laws.

[8] *See* NYSE Rule 345, Supplementary Material .14. NYSE's registration fee for registered representatives is comparable to FINRA's registration fees for the registration of representatives or principals. *See also* Section 4(b) of Schedule A of FINRA By-Laws.

[9] *See* Securities Exchange Act Release No. 57093 (January 3, 2008), 73 FR 1654 (January 9, 2008) (Notice of Filing and Immediate Effectiveness of SR–NYSE–2007–127).

[10] The NYSE will continue to charge its member organizations an annual gross FOCUS fee; however, the fee was reduced by 75 percent beginning in 2008. *See* Securities Exchange Act Release No. 56181, *supra* note 5. The reduced gross FOCUS fee charged by NYSE will be retained by NYSE and will not be forwarded to FINRA.

[11] Gross revenue for assessment purposes is set out in Section 2 of Schedule A of FINRA's By-Laws, which defines gross revenue as total income as reported on FOCUS form Part II or IIA excluding commodities income.

[12] In calculating the cap based upon the GFF that a member would have paid under the prior NYSE GFF rate structure, FINRA will use only that portion of the GFF that would have been transferred by the NYSE to FINRA (*i.e.*, 75 percent of the GFF paid by the member firm).

[13] For an example of how the fees are calculated, *see* Notice, *supra* note 4, at note 15.

[14] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[15] 15 U.S.C. 78*o*–3(b)(5).

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[16] that the proposed rule change (SR–FINRA–2008–001), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–5355 Filed 3–17–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57480; File No. SR–FINRA–2008–008]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 1013 (New Member Application and Interview) and the Manner in Which Membership Applicants Submit Their Applications to FINRA

March 12, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 29, 2008, the Financial Industry Regulatory Authority, Inc., (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA. FINRA has designated this proposal as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule under Section 19(b)(3)(A)(i) of the Act [3] and Rule 19b–4(f)(1) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA proposes to amend NASD Rule 1013 (New Member Application and Interview) to change the manner in which membership applicants submit their applications to FINRA. FINRA also proposes changes to online Form NMA to make it a more interactive, user-friendly document that applicants can use to submit application information. The text of the proposed rule change is available at *http://www.finra.org,* FINRA, and the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In an effort to streamline the membership application process and make it more efficient, FINRA recently required membership applicants to complete and submit electronically via the Electronic Filing System (''EFS'') FINRA's standardized membership application form, the Form NMA. NASD Rule 1013 requires that the Form NMA and other required application materials be filed with the Department of Member Regulation (''Department'') at the district office in the district in which the applicant intends to have its principal place of business. Although the Form NMA can be forwarded electronically to the district offices, applicants must submit certain required application materials, such as the Form BD, fingerprint cards of associated persons, the new member assessment report, CRD entitlement forms, and the membership application fee via first class mail, overnight courier, or hand delivery.[5]

The instant proposed rule change would amend NASD Rule 1013 to require that an application be filed directly with the Department. Pursuant to the proposed rule change, FINRA will require applicants to send all hard copy application materials to a central location within the Department, and EFS automatically will route the Form NMA to the same location within the Department. The proposed rule change also would amend NASD Rule 1013 to eliminate the requirement that applicants submit the membership application fee by physical check. Instead, FINRA will require applicants to pay the fees electronically.

Further, FINRA proposes to change the Form NMA from a static electronic document to an interactive, user-friendly document that will provide a more tailored application experience. The revised Form NMA automatically will retrieve certain information (*e.g.*, identification information, proposed business lines, etc.) from the applicants' Forms U4 and the Form BD, which FINRA will require applicants to submit prior to completion of the Form NMA.[6] The revised form also will have applicants provide a greater level of detail regarding the required application information. FINRA anticipates that these changes to the Form NMA will result in a more complete and accurate application that, in turn, will allow FINRA staff to conduct a more timely evaluation and make fewer information requests during the course of the review.

The proposed rule change would alter the manner in which FINRA receives a membership application and revise the online Form NMA to make it more interactive; it would not change the information applicants must submit pursuant to NASD Rule 1013 during the application process or the standards set forth in NASD Rule 1014 for granting an applicant's membership application. Additionally, the proposed changes are consistent with the FINRA By-Laws, which allow FINRA to require that new member applications be made ''via electronic process or such other process as the Corporation may prescribe.'' [7]

Finally, the proposed rule change would amend the NASD Rule Series 1010 (Membership Proceedings) to reflect FINRA's change in corporate name or to otherwise delete references to ''the Association.''

Prior to the proposed rule change becoming operative, FINRA will outline in a *Regulatory Notice* the details regarding the changes to the electronic

[16] 15 U.S.C. 78s(b)(2).

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] 17 CFR 240.19b–4(f)(1).

[5] *See* NASD Rule 1012(a)(2) (requiring an applicant to file application documents and information by first class mail, overnight courier, or hand delivery where FINRA has not otherwise prescribed an electronic or alternative filing process).

[6] Although applicants submit their Form BD in hard copy, the revised Form NMA will be able to retrieve the information via an electronic database that FINRA staff currently populates with Form BD information. Applicants already submit Forms U4 in an electronic format accessible to the revised form.

[7] FINRA By-Laws, Art. IV, Sec. 1(a).

application process and how to complete the revised Form NMA.[8]

FINRA has filed the proposed rule change for immediate effectiveness. The effective date will be the date of filing, February 29, 2008. FINRA will announce the implementation date in a *Regulatory Notice* to be published no later than 30 days following the effective date.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[9] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The proposed rule change amends NASD Rule 1013 to require that an applicant file a membership application directly with the Department instead of with a particular district office and revises the online Form NMA to make it more interactive. The proposed rule change does not propose any new or additional content requirements for member applications. The proposed rule change also eliminates the requirement to pay the membership application fee with a physical check. FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) as it will ensure a more streamlined and efficient membership application process.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A)(i) of the Act[10] and Rule 19b–4(f)(1)[11] thereunder, because it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–FINRA–2008–008 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2008–008. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m.. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2008–008 and should be submitted on or before April 8, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–5418 Filed 3–17–08; 8:45 am]

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[8] FINRA will also provide advance notice through the *Regulatory Notice* process (or similar guidance) of any systems changes to the electronic application process that would alter the manner in which applicants interact with the electronic filing system.

[9] 15 U.S.C. 78o–3(b)(6).

[10] 15 U.S.C. 78s(b)(3)(A)(i).

[11] 17 CFR 240.19b–4(f)(1).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57468; File No. SR–ISE–2008–09]

Self-Regulatory Organizations; International Securities Exchange, LLC; Order Approving Proposed Rule Change To Amend Exchange Rules Related to the Imposition of Fines for Minor Rule Violations

March 11, 2008.

On January 18, 2008, the International Securities Exchange, LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend ISE Rule 1614, ''Imposition of Fines for Minor Rule Violations,'' to add summary fines for violations of ISE Rule 1100, ''Exercise of Options Contracts.'' The proposed rule change was published for comment in the **Federal Register** on February 5, 2008.[3] The Commission received no comments regarding the proposal. This order approves the proposed rule change.

The Exchange proposes to add a summary fine schedule pursuant to its Minor Rule Violation Plan (''MRVP'') that will apply to any member who fails to submit to the Exchange in a timely manner pursuant to ISE Rule 1100 (or a regulatory information circular issued pursuant to ISE Rule 1100) an ''Advice Cancel'' or exercise instruction relating to the exercise or nonexercise of a noncash-settled equity option. The Exchange believes that imposing the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57229 (January 29, 2008), 73 FR 6753.

fine levels specified with respect to both individual members and member organizations, and providing for a rolling 24-month surveillance period, will serve as an effective deterrent to such violative conduct.[4]

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[5] In particular, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,[6] which requires that the rules of an exchange be designed to promote just and equitable principles of trade, to facilitate transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission further believes that ISE's proposal to impose sanctions on individuals and member organizations who fail to submit Advice Cancel or exercise instructions in a timely manner is consistent with Sections 6(b)(1) and 6(b)(6) of the Act,[7] which require that the rules of an exchange enforce compliance with, and provide appropriate discipline for, violations of Commission and Exchange rules. In addition, the Commission finds that the proposal is consistent with the public interest, the protection of investors, or otherwise in furtherance of the purposes of the Act, as required by Rule 19d–1(c)(2) under the Act,[8] which governs minor rule violation plans. The Commission believes that the proposed rule change should strengthen the Exchange's ability to carry out its oversight and enforcement responsibilities as an SRO in cases where full disciplinary proceedings are unsuitable in view of the minor nature of the particular violation.

In approving this proposed rule change, the Commission in no way minimizes the importance of compliance with ISE rules and all other rules subject to the imposition of fines under the MRVP. The Commission believes that the violation of any SRO rules, as well as Commission rules, is a serious matter. However, the MRVP provides a reasonable means of addressing rule violations that do not rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handling certain violations. The Commission expects that ISE would continue to conduct surveillance with due diligence and make a determination based on its findings, on a case-by-case basis, whether a fine of more or less than the recommended amount is appropriate for a violation under the ISE MRVP or whether a violation requires formal disciplinary action.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[9] and Rule 19d–1(c)(2) under the Act,[10] that the proposed rule change (SR–ISE–2008–09) be, and hereby is, approved and declared effective.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–5351 Filed 3–17–08; 8:45 am]

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[4] In addition, as a member of the Intermarket Surveillance Group, the Exchange, as well as certain other self-regulatory organizations (''SROs'') executed and filed on October 29, 2007 with the Commission, a final version of an Agreement pursuant to Section 17(d) of the Act (the ''17d–2 Agreement''). As set forth in the 17d–2 Agreement, the SROs have agreed that their respective rules concerning the filing of Expiring Exercise Declarations, also referred to as Contrary Exercise Advices, of options contracts, are common rules. As a result, the proposal to amend ISE's MRVP will result in further consistency in sanctions among the SROs that are signatories to the 17d–2 Agreement concerning Contrary Exercise Advice violations.

[5] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78f(b)(1) and 78f(b)(6).

[8] 17 CFR 240.19d–1(c)(2).

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 240.19d–1(c)(2).

[11] 17 CFR 200.30–3(a)(12); 17 CFR 200.30–3(a)(44).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57478; File Nos. SR–NASDAQ–2007–004 and SR–NASDAQ–2007–080]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Amendment No. 2 to a Proposed Rule Change and Order Granting Accelerated Approval to a Proposed Rule Change, as Amended, To Establish Rules Governing the Trading of Options on the NASDAQ Options Market; Order Approving a Proposed Rule Change Relating to the LLC Agreement Establishing the NASDAQ Options Market LLC and Delegation Agreement Delegating to NOM LLC the Authority To Operate the NASDAQ Options Market; Order Granting an Application of The NASDAQ Stock Market LLC for an Exemption Pursuant to Section 36(a) of the Exchange Act from the Requirements of Section 19(b) of the Exchange Act; and Order Granting an Exemption for the NASDAQ Options Market LLC from Section 11A(b) of the Exchange Act

March 12, 2008.

I. Introduction

On January 30, 2007, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change (''Trading Rules Proposal'') to adopt rules governing participation in and trading on The NASDAQ Options Market (''NOM''), which will be an options exchange facility of Nasdaq operated by The Nasdaq Options Market LLC (''NOM LLC''). The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on May 1, 2007.[3] The Commission received five comment letters regarding the proposed rule change.[4] Nasdaq responded to the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 55667 (April 25, 2007), 72 FR 23869 (''Trading Rules Proposal Notice'').

[4] *See* letters to Nancy M. Morris, Secretary, Commission, from Stephen Schuler, Managing Member, Global Electronic Trading Company (''GETCO''), and Daniel Tierney, Managing Member, GETCO, dated July 20, 2007 (''GETCO Letter''); Michael J. Simon, Secretary, The International Securities Exchange, LLC (''ISE''), dated June 15, 2007 (''ISE Letter''); John C. Nagel, Director and Associate General Counsel, Citadel Investment

Continued

commenters in a letter dated December 13, 2007,[5] and filed Amendment No. 2 to the proposal on December 13, 2007. This notice and order provides notice and solicits comments from interested persons regarding Amendment No. 2 and approves the Trading Rules Proposal, as amended, on an accelerated basis.

Also, on September 17, 2007, the Exchange filed with the Commission a proposed rule change, pursuant to Section 19(b)(1) of the Act[6] and Rule 19b–4 thereunder,[7] to establish, through a limited liability company agreement, NOM LLC, and to delegate to NOM LLC the authority to operate NOM as a facility of Nasdaq (''Corporate Structure Proposal,'' and, with the Trading Rules Proposal, the ''Proposals''). The proposed rule change was published for comment in the **Federal Register** on October 12, 2007.[8] The Commission received no comments on the proposal. This order approves the Corporate Structure Proposal.

On December 13, 2007, Nasdaq requested that the Commission grant NOM LLC a permanent exemption from the requirement under Section 11A(b) of the Act and Rule 609 thereunder that a securities information processor (''SIP'') acting as an exclusive processor register with the Commission.[9] Further, on December 13, 2007, Nasdaq asked the Commission to exempt Nasdaq from the rule filing requirements of Section 19(b) of the Act for changes to NOM rules that are effected solely by virtue of a change to a Chicago Board Options Exchange (''CBOE''), New York Stock Exchange (''NYSE''), or Financial Industry Regulatory Authority (''FINRA'') rule that NOM has incorporated by reference. This order grants these exemptions.

II. Discussion and Commission Findings

After careful review of the Trading Rule Proposal, as amended, and consideration of the comment letters and Nasdaq's response to the commenters, and the Corporate Structure Proposal, the Commission finds that the Trading Rules Proposal, as amended, and the Corporate Structure Proposal are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[10] Specifically, the Commission finds that the Proposals are consistent with Section 6(b)(5) of the Act,[11] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest. Section 6(b)(5) also requires that the rules of an exchange not be designed to permit unfair discrimination among customers, issuers, brokers, or dealers. Further, the Commission finds that the Proposals are consistent with Sections 6(b)(1) of the Act,[12] which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulation thereunder, and the rules of the exchange, and Section 6(b)(2) of the Act,[13] which requires, in part, that the rules of an exchange assure a fair representation of its members in the selection of its directors and administration of its affairs.

Overall, the Commission believes that approving Nasdaq's Proposals could confer important benefits on the public and market participants. In particular, NOM's entry into the marketplace could provide market participants with an additional venue for executing orders in standardized options, enhance innovation, and increase competition between and among the options exchanges, resulting in better prices and executions for investors.

This discussion does not review every detail of the proposed rule changes, but focuses on the comments received and the most significant rules and policy issues considered in review of the proposals.

A. Corporate Structure

In connection with the establishment of NOM, Nasdaq has entered into a limited liability company agreement (''NOM LLC Agreement'') to establish NOM LLC as a Delaware limited liability company that will operate NOM as a facility of Nasdaq, as that term is defined in Section 3(a)(2) of the Act.[14] Nasdaq and NOM LLC also will enter into a delegation agreement (''NOM Delegation Agreement''), pursuant to which Nasdaq will delegate to NOM LLC certain limited responsibilities and obligations with respect to the operation of NOM as an options facility of Nasdaq.[15]

Nasdaq, a registered national securities exchange, is the wholly-owned subsidiary of The NASDAQ Stock Market, Inc. (''Nasdaq Holding Company''). NOM LLC will be a direct, wholly-owned subsidiary of Nasdaq, and, pursuant to the NOM LLC Agreement, Nasdaq may not transfer or assign, in whole or in part, its interest in NOM LLC.[16] Further, NOM will be operated as a facility of the Exchange and Nasdaq will retain self-regulatory responsibility for NOM.

1. Changes in Control of NOM; Ownership and Voting Limitations

The Commission notes that the Nasdaq Holding Company's Restated Certificate of Incorporation imposes limits on direct and indirect changes in control, which are designed to prevent any shareholder from exercising undue control over the operation of the Exchange and to ensure that the

Group L.L.C. (''Citadel''), dated June 11, 2007 (''Citadel Letter''); Michael T. Bickford, Senior Vice President, Options, American Stock Exchange LLC (''Amex''), dated May 24, 2007 (''Amex Letter''); and Christopher Nagy, Chair, Securities Industry and Financial Markets Association (''SIFMA'') Options Committee, dated May 22, 2007 (''SIFMA Letter'').

[5] *See* letter from Jeffrey S. Davis, Vice President and Deputy General Counsel, Nasdaq, to Nancy M. Morris, Secretary, Commission, dated December 13, 2007 (''Nasdaq Response'').

[6] 15 U.S.C. 78s(b)(1).

[7] 17 CFR 240.19b–4.

[8] *See* Securities Exchange Act Release No. 56604 (October 3, 2007), 72 FR 58137 (''Corporate Structure Proposal Notice'').

[9] 15 U.S.C. 78k–1(b). Rule 609 under the Act, 17 CFR 242.609, requires that the registration of a securities information processor be on Form SIP, 17 CFR 249.1001.

[10] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78f(b)(1).

[13] 15 U.S.C. 78f(b)(2).

[14] 15 U.S.C. 78c(a)(2). Pursuant to Section 3(a)(2), a ''facility'' ''with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.''

[15] The form of each of the NOM LLC Agreement and NOM Delegation Agreement are available at the Commission's Web site *http://www.sec.gov*.

[16] *See* NOM LLC Agreement, Section 19. Also, Nasdaq Holding Company may not transfer or assign its interest in Nasdaq, other than to an affiliate of Nasdaq Holding Company. *See* Limited Liability Company Agreement of The NASDAQ Stock Market LLC, Section 20. Any change to Nasdaq's status as the sole member of NOM LLC, or to Nasdaq Holding Company's status as the sole member of Nasdaq, would have to be filed pursuant to Section 19(b) of the Act. 15 U.S.C. 78s.

Exchange and the Commission are able to carry out their regulatory obligations under the Act. Specifically, no person who beneficially owns shares of common stock, preferred stock, or notes in excess of five percent of the securities generally entitled to vote may vote shares in excess of five percent.[17]

The Exchange's rules also prohibit Exchange members and persons associated with Exchange members from beneficially owning more than 20 percent of the then-outstanding voting securities of Nasdaq Holding Company.[18] Members that trade on an exchange or through the facility of an exchange traditionally have ownership interests in such exchange or facility. The Commission has noted in the past, however, that a member's interest in an exchange could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member.[19] A member that is a controlling shareholder of an exchange might be tempted to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and surveil the member's conduct or diligently enforce its rules and the federal securities laws with respect to conduct by the member that violates such provisions.

The Commission believes that the proposed corporate structure for NOM is consistent with the Act. The voting restrictions imposed on shareholders of Nasdaq Holding Company will flow through to NOM LLC by virtue of the fact that NOM LLC will be a wholly-owned subsidiary of Nasdaq, which is a wholly-owned subsidiary of Nasdaq Holding Company. The ownership limitation on members of Nasdaq will apply to NOM participants by virtue of the fact that all NOM participants must be members of the Exchange. These ownership and voting restrictions are designed to minimize the potential that a person could improperly interfere with or attempt to restrict the ability of the Commission or the Exchange to effectively carry out their regulatory oversight responsibilities under the Act.

2. Fair Representation

NOM LLC will not have its own board of directors or committees separate from the board and committees of the Exchange. The Commission believes that because NOM LLC does not have a separate board, and because all NOM participants will be Exchange members, the composition of and selection process for the Exchange board continues to satisfy the requirement in Section 6(b)(3) of the Act that the rules of the Exchange provide for the fair representation of members in the selection of directors and the administration of the Exchange.[20]

3. Regulatory Independence

As noted above, NOM LLC will not have its own board or committees separate from those of the Exchange. Additionally, pursuant to the NOM LLC Agreement, management of the company is vested in the Exchange, and the officers of NOM LLC will be the officers of the Exchange.[21] As a result, NOM LLC may only act through the Exchange and its officers and directors.

The Commission notes that certain provisions of the Exchange's and Nasdaq Holding Company's corporate documents are designed to maintain the independence of Nasdaq's self-regulatory function, enable the Exchange to operate in a manner that complies with federal securities laws, including the objectives of Sections 6(b) and 19(g) of the Act, and facilitate the ability of Nasdaq and the Commission to fulfill their regulatory and oversight obligations under the Act.[22] As a facility of Nasdaq, the protections afforded by these provisions in the corporate documents of the Exchange and Nasdaq Holding Company extend to the operation of NOM.

Similar provisions also are included in the NOM Delegation Agreement. For example, NOM agrees: (1) To keep confidential non-public information relating to Nasdaq and not to use such information for any commercial purposes; (2) to provide the Commission and Nasdaq access to NOM's books and records at all times and to maintain such books and records within the United States; (3) that the books, records, premises, officers, and employees of NOM shall be deemed to be those of Nasdaq for purposes of the Act; and (4) to cooperate with, and take reasonable steps to cause its agents to cooperate with, the Commission and Nasdaq pursuant to their regulatory authority. In addition, NOM and its officers and employees submit to the jurisdiction of the Commission and agree to give due regard to the preservation of the self-regulatory function of Nasdaq.[23] Further, the NOM Delegation Agreement may not be amended unless such amendment is filed with, or filed with and approved by, the Commission pursuant to Section 19 of the Act.[24] The Commission believes that these provisions, which are designed to assist Nasdaq in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act, are consistent with the Act, in particular Sections 6(b)(1) and 19(g).

B. Status of NOM as a Facility of Nasdaq and Delegation of Authority to NOM LLC

As a facility of Nasdaq, NOM will be subject to the Commission's oversight and examination. Consequently, the Commission will have the same authority to oversee the premises, personnel, and records of NOM LLC as it currently has with respect to Nasdaq. In addition, Nasdaq will be fully responsible for all activity that takes place through NOM, and NOM participants will be subject to Nasdaq's rules and oversight.

As described in detail in the Notice, the NOM Delegation Agreement provides that Nasdaq will delegate to NOM LLC performance of certain limited responsibilities and obligations of Nasdaq with respect to the operation of NOM as an options trading facility. Nasdaq, however, expressly retains ultimate responsibility for the fulfillment of its statutory and self-regulatory obligations under the Act. Accordingly, as described more fully below, Nasdaq will retain ultimate responsibility for such delegated responsibilities and functions, and any actions taken pursuant to delegated authority will remain subject to review, approval or rejections by Nasdaq's board

[17] *See* Nasdaq Holding Company Restated Certificate of Incorporation, Article Fourth, C. The Nasdaq Holding Company board of directors may approve an exemption from the five percent voting limitation for any person that is not a broker-dealer, an affiliate of a broker-dealer, or a person subject to a statutory disqualification under Section 3(a)(39) of the Act. *See id*. Any such exemption from the five percent voting limitation would not be effective until approved by the Commission pursuant to Section 19 of the Act. *See* Nasdaq Holding Company By-Laws, Article XII, Section 12.5.

[18] *See* Exchange Rule 2130.

[19] *See* Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (order approving Nasdaq's application to register as a national securities exchange) (''Registration Approval Order'') at note 42 and accompanying text.

[20] *See* Registration Approval Order, *supra* note 19, at 3553.

[21] *See* NOM LLC Agreement, Sections 9 and 10, respectively. *See also* Section 9(b) of the NOM LLC Agreement which requires NOM LLC and the Exchange to comply with federal securities laws and the rules and regulations thereunder, and to cooperate with the Commission and NOM pursuant to their regulatory authority.

[22] A discussion of Nasdaq's corporate structure and the protections afforded by the corporate documents of Nasdaq and Nasdaq Holding Company, is set forth in the Registration Approval Order, *supra* note 19. The corporate documents of Nasdaq and Nasdaq Holding Company are not being amended by this proposed rule change.

[23] *See* NOM Delegation Agreement, II.B.

[24] *See* NOM Delegation Agreement, III.

of directors in accordance with procedures established by Nasdaq's board of directors. Nasdaq has filed the NOM Delegation Agreement as part of its rules.

Pursuant to the Delegation Agreement, Nasdaq expressly retains the authority to (1) delegate authority to NOM LLC to take actions on behalf of the Exchange, and (2) direct NOM LLC to take action necessary to effectuate the purposes and functions of Nasdaq, consistent with the independence of Nasdaq's regulatory functions, exchange rules, policies and procedures, and the federal securities laws.[25] NOM LLC will have delegated authority to, among other things, operate NOM, develop and adopt governing listing standards applicable to options listed on NOM in consultation with Nasdaq, and establish and assess listing fees, transaction fees, market data fees and other fees for the products and services offered by NOM.[26] In addition, NOM LLC will have the authority to act as a SIP for quotations and transaction information related to securities traded on NOM and any trading facilities operated by NOM LLC.[27]

NOM LLC also will have authority to develop, adopt, and administer rules governing participation in NOM,[28] but the Exchange represents that it will have ultimate responsibility for the operations, rules and regulations developed by NOM LLC, as well as their enforcement. Further, the Exchange represents that actions taken by NOM LLC pursuant to its delegated authority will remain subject to review, approval or rejection by the Exchange's board of directors.[29] In addition, NOM LLC will be responsible for referring to Nasdaq any complaints of a regulatory nature involving potential rule violations by member organizations or employees,[30] and Nasdaq will retain overall responsibility for ensuring that the statutory and self-regulatory functions of the Exchange are fulfilled.[31]

The Commission finds that it is consistent with the Act for Nasdaq to delegate the operation of NOM to NOM LLC, while retaining ultimate responsibility for statutory and self-regulatory obligations and ensuring that NOM's business is conducted in a manner consistent with the requirements of the Act.

C. Access to NOM

Only Options Participants (''Options Participants'' or ''Participants'') may transact business on NOM via the System.[32] There are two categories of Participants: (1) Options Order Entry Firms (''OEFs''), which represent customer orders as agent or conduct proprietary trading; and (2) Options Market Makers (''Options Market Makers'' or ''Market Makers''). A Participant must be a member of Nasdaq and of another registered options exchange that is not registered solely under Section 6(g) of the Act.[33] As Nasdaq members, Participants must satisfy the requirements of the Nasdaq Rule 1000 Series (Membership, Registration, and Qualification Requirements), as well as additional requirements set forth in the NOM rules.[34] Further, an OEF may transact business with Public Customers only if it is a member of another registered national securities exchange or association with which Nasdaq has entered into an agreement under Rule 17d–2 under the Act [35] pursuant to which the other exchange or association is the designated options examining authority for the OEF.[36] In addition, Options Participants that transact business with customers must be members of FINRA.[37]

Among other things, each Participant must be registered as a broker-dealer and have as the principal purpose of being a Participant the conduct of a securities business, which shall be deemed to exist if and so long as: (1) The Participant has qualified and acts in respect of its business on NOM as either an OEF or an Options Market Maker or both; and (2) all transactions effected by the Participant are in compliance with Section 11(a) of the Act [38] and the rules and regulations thereunder.[39] Participants may trade options for their own proprietary accounts or, if authorized to do so under applicable law, may conduct business on behalf of customers.[40]

1. OEFs

OEFs are Participants representing customer orders as agent on NOM or trading as principal on NOM.[41] OEFs also may register as Market Makers. A Market Maker that engages in specified Other Business Activities, or that is affiliated with a broker-dealer that engages in Other Business Activities, including functioning as an OEF, must have an Information Barrier between the market making activities and the Other Business Activities.[42]

One commenter believes that the ability of OEFs, like Market Makers, to enter orders on both sides of the market for the same customer raises questions concerning the rights and responsibilities of the OEF and the customer. In particular, the commenter asks whether Market Makers will have exclusive access to certain NOM systems or other tools, or otherwise have rights that differ from the rights of these customers. The commenter also asserts that NOM's proposal lacks clarity regarding its Participants' responsibility for surveillance of the activities of these market participants.[43]

In response, Nasdaq stated its belief that the NOM market model is similar to Nasdaq's equity market structure and does not raise any unique or challenging issues for order entry firms and investors. Nasdaq further believes that most Participants will be familiar with the regulatory and surveillance requirements associated with access to NOM from their businesses in equity securities.[44] Nasdaq represents that,

[25] *See* Corporate Structure Proposal Notice, *supra* note 8, at 58140 and NOM Delegation Agreement, I.

[26] *See* Corporate Structure Proposal Notice, *supra* note 8, at 58140 and NOM Delegation Agreement, II.A.

[27] *See* NOM Delegation Agreement, II.A.3.

[28] *Id.*

[29] *See* Corporate Structure Proposal Notice, *supra* note 8, at 58140.

[30] *See* NOM Delegation Agreement, II.A.9.

[31] *See* NOM Delegation Agreement, I.1.

[32] *See* NOM Rules, Chapter II, Section 1(a). An Options Participant is a firm or organization registered with Nasdaq pursuant to Chapter II of the NOM Rules for purposes of participating in options trading on NOM as an Order Entry Firm or Options Market Maker. *See* NOM Rules, Chapter I, Section 1(a)(40).

[33] 15 U.S.C. 78f(g). *See* NOM Rules, Chapter II, Sections 1(a)(iii) and 2(f). In Amendment No. 2, Nasdaq proposes to eliminate from Chapter II, Section 1(b)(iii) a provision stating that a Nasdaq member would automatically become a NOM Participant upon completing a NOM Application and paying the applicable fees. Nasdaq believes that this provision did not accurately reflect the intended scope of review of NOM applicants, and that eliminating the provision will improve the quality of regulation of NOM. The Commission finds that this change is consistent with the Act.

[34] *See* NOM Rules, Chapter II. Nasdaq's rules apply to Participants unless a specific NOM rule governs or unless the context otherwise requires. *See* NOM Rules, Chapter I, Section 2. Among others, Participants will be able to provide sponsored access to NOM to a non-member (''Sponsored Participant'') pursuant to Nasdaq Rule 4611(d), which Nasdaq adopted in 2007. *See* Securities Exchange Act Release Nos. 55061 (January 8, 2007), 72 FR 2052 (January 17, 2007) (notice of filing and immediate effectiveness of File No. SR–Nasdaq–2006–061) (adopting Nasdaq Rule 4611(d)); and 55550 (March 28, 2007), 72 FR 16389 (April 4, 2007) (notice of filing and immediate effectiveness of File No. SR–Nasdaq–2007–010) (revising Nasdaq Rule 4211(d)).

[35] 17 CFR 240.17d–2.

[36] *See* NOM Rules, Chapter XI, Section 1. *See also* notes 240 to 241, *infra,* and accompanying text for a discussion of Rule 17d–2.

[37] *See* NOM Rules, Chapter II, Section 2(f).

[38] 15 U.S.C. 78k(a).

[39] *See* NOM Rules, Chapter II, Section 2(e).

[40] *See* NOM Rules, Chapter II, Section 1(a).

[41] *See* NOM Rules, Chapter VII, Section 1.

[42] *See* NOM Rules, Chapter VII, Section 10.

[43] *See* SIFMA Letter, *supra* note 4, at 2.

[44] *See* Nasdaq Response, *supra* note 5, at 2.

within the System, Market Makers will not have any special priorities or other privileges.[45]

The Commission believes that it is consistent with the Act for an options exchange not to prohibit a user of its market from effectively operating as a market maker by holding itself out as willing to buy and sell options contracts on a regular or continuous basis without registering as a market maker.[46] The Commission notes that although an entity that effectively acts as a market maker but is not registered as such will not be required to comply with any rules applicable to a Market Maker, it also will not be eligible to receive certain benefits of being a Market Maker.[47] The Commission also agrees with Nasdaq's assertion that NOM does not raise any unique issues related to surveillance or the responsibilities of OEFs, and notes that all Options Participants must also be members of Nasdaq. Further, the Commission notes that an entity that acts as a ''dealer,'' as defined in Section 3(a)(5) of the Act,[48] would be required to register with the Commission under Section 15 of the Act,[49] and the rules and regulations thereunder, or qualify for any exception or exemption from registration.[50]

2. Market Makers

a. Registration of Market Makers

An Options Market Maker is a Participant registered with Nasdaq as a Market Maker.[51] To register as a Market Maker, a Participant must file a written application with Nasdaq Regulation, which will consider an applicant's market making ability and other factors it deems appropriate in determining whether to approve an applicant's registration.[52] All Market Makers are designated as specialists on NOM for all purposes under the Act or rules thereunder.[53] The NOM Rules place no limit on the number of qualifying entities that may become Market Makers.[54] The good standing of a Market Maker may be suspended, terminated, or withdrawn if the conditions for approval cease to be maintained or the Market Maker violates any of its agreements with Nasdaq or any provisions of the NOM Rules.[55] A Participant that has qualified as a Market Maker may register to make markets in individual series of options.[56]

The Commission finds that NOM Market Maker qualifications requirements are consistent with the Act, and notes that they are similar to those of other options exchanges.[57] Further, the Commission believes that allowing NOM Market Makers to register by series, rather than by class, will permit Market Makers to select the options series they are most interested in trading. This is designed to help to reduce the number of quotes submitted by such Market Makers, and therefore could help to mitigate NOM's quote message traffic and capacity.[58]

b. Market Maker Obligations

Pursuant to NOM rules, the transactions of a Market Maker in its market making capacity must constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market.[59] Further, among other things, a Market Maker must: (1) On a daily basis participate in the pre-opening phase and maintain a two-sided market on a continuous basis in at least 75% of the options series in which it is registered;[60] (2) enter a size of at least ten contracts for its best bid and its best offer;[61] and (3) maintain minimum net capital in accordance with Commission and Nasdaq rules.[62] In addition, Nasdaq may call upon a Market Maker to submit a single bid or offer or to maintain continuous bids and offers in one or more of the series in which the Market Maker is registered if, in Nasdaq's judgment, it is necessary to do so in the interest of fair and orderly markets.[63] If Nasdaq finds any substantial or continued failure by a Market Maker to engage in a course of dealings as specified in Chapter VII, Section 5(a) of the NOM Rules, such Market Maker will be subject to disciplinary action or suspension or revocation of registration in one or more of the securities in which the Market Maker is registered.[64]

One commenter notes that NOM's rules do not appear to assure that there will be continuous quotes in a particular series because a Market Maker could cease disseminating quotes for a series at any time during the trading day, and requests that Nasdaq clarify a market maker's continuous quoting obligations.[65] In response, Nasdaq notes that other options markets face the possibility that a registered market maker will withdraw its quotes during the trading day, and that NOM's rules permit Nasdaq to require a market maker to quote continuously in a series in which it is registered.[66] Nasdaq further notes that it intends to provide functionality that will allow its Market Makers to instruct the NOM System to automatically input a quotation on the side of the market that has been depleted. In addition, Nasdaq represents that it will bring an appropriate disciplinary action against a Market

[45] 45 *Id.* at 5. Registered market makers do, however, receive certain benefits for carrying out their responsibilities. For example, a lender may extend credit to a broker-dealer without regard to the restrictions in Regulation T of the Board of Governors of the Federal Reserve System if the credit is used to finance the broker-dealer's activities as a specialist or market maker on a national securities exchange (*see* 12 CFR 221.5(c)(6)). In addition, market makers are excepted from the prohibition in Section 11(a) of the Act.

[46] *See* Securities Exchange Act Release No. 38054 (December 16, 1996), 61 FR 67365 (December 20, 1996) (order approving File No. SR-CBOE–95–48).

[47] *See* infra notes 76 and 84 and accompanying text.

[48] 15 U.S.C. 78c(a)(5).

[49] 15 U.S.C. 78*o*.

[50] Activity that may cause a person to be deemed a dealer includes '''quoting a market in or publishing quotes for securities (other than quotes on one side of the market on a quotations system generally available to non-broker-dealers, such as a retail screen broker for government securities).''' *See* Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Securities Exchange Act Release No. 47364, 68 FR 8685, 8689, note 26 (February 24, 2003) (quoting OTC Derivatives Dealers, Securities Exchange Act Release No. 40594, 63 FR 59362, 59370, note 61 (November 3, 1998)).

[51] *See* NOM Rules, Chapter VII, Section 2.

[52] *See* NOM Rules, Chapter VII, Section 2(a).

[53] *See* NOM Rules, Chapter VII, Section 2.

[54] *See* NOM Rules, Chapter VII, Rule 2(c). However, Nasdaq may limit access to the System based on system constraints, capacity restrictions, or other factors relevant to protecting the integrity of the System, pending action required to address the issue of concern. To the extent that Nasdaq places limitations on access to the System on any Participant(s), such limits shall be objectively determined and submitted to the Commission for approval pursuant to a rule change filed under Section 19(b) of the Act. *See* NOM Rules, Chapter VII, Section 2(c).

[55] *See* NOM Rules, Chapter VII, Section 4(b).

[56] *See* NOM Rules, Chapter VII, Section 3(a).

[57] *See, e.g.*, BOX Rules, Chapter VI, Section 2 and ISE Rule 804.

[58] *See* Securities Exchange Act Release No. *See* Securities Exchange Act Release No. 55027 (December 29, 2006), 72 FR 1358 (January 11, 2007) (order approving File No. SR-Phlx-2006–53). Further, one commenter believes that series-by-series registration will allow market makers to target the series for which they are most apt to provide liquidity, which in turn will create greater liquidity across the entire market. *See* GETCO Letter, *supra* note 4, at 2.

[59] *See* NOM Rules, Chapter VII, Section 5(a). Amendment No. 2 replaces the provisions in the NOM proposal related to the Exchange's ability to automatically cancel all bids and offers posted by a Market Maker under certain circumstances with provisions allowing any Options Participant to ask NOM staff to simultaneously cancel all of the Options Participant's bids, offers, and orders in all series. *See* NOM Rules, Chapter VII, Section 11. The Commission believes that the proposed change is reasonably designed to enable Participants to limit their risk and is consistent with the Act.

[60] *See* NOM Rules, Chapter VII, Section 6(d)(i).

[61] *See* NOM Rules, Chapter VII, Section 6(a).

[62] *See* NOM Rules, Chapter VII, Section 4(a)(i).

[63] *See* NOM Rules, Chapter VII, Section 6(d)(ii).

[64] *See* NOM Rules, Chapter VII, Section 5(c).

[65] *See* SIFMA Letter, *supra* note 4, at 1.

[66] *See* Nasdaq Response, *supra* note 5, at 3, and NOM Rules, Chapter VII, Section 6(d)(ii).

Maker that fails to meet its quoting obligations.[67]

This commenter also requests clarification of NOM's treatment of options series without a Market Maker. In particular, the commenter questions the actions NOM will take if a Market Maker withdraws from making markets in a series, including whether NOM will continue to match orders in the series.[68] To the extent that the commenter is questioning what will happen if a Market Maker registered in a series does not have a quote in that series (as opposed to the Market Maker withdrawing from registration in the series),[69] Nasdaq states that NOM will continue to route and execute orders in that series. In addition, Nasdaq states that, if an order is received by NOM when its quote is not at the NBBO, NOM will route the order automatically to a market at the NBBO. An order displayed on NOM that becomes marketable will be accessible through the Linkage.[70]

The definition of a ''market maker'' includes a dealer who holds itself out as being willing to buy and sell a security for his account on a regular or continuous basis.[71] Therefore, although under NOM's proposal certain series may not have continuous quotes disseminated by NOM, the Commission believes that the obligations imposed by the NOM Rules on Market Makers fall within the definition of market maker because they will require a NOM Market Maker to hold itself out as being willing to buy and sell a security for its account on a regular basis. The Commission therefore believes that the obligations imposed by the NOM Rules on Market Makers are consistent with the Act.[72]

The commenter also asserts that other options exchanges generally require market makers to provide two-sided quotations for 80% of the classes in which a market maker is registered, and that uniform quotation requirements among the options markets would be desirable.[73] In its response letter, Nasdaq states that NOM's Market Maker participation standard, which will allow Market Makers to register in particular options series rather than an entire class, should result in active participation in all series for which a Market Maker registers voluntarily.[74] In addition, Nasdaq maintains that its approach is numerically superior to other options exchanges, noting that the BOX Rules effectively require market makers to maintain continuous two-sided quotes in only 72% of the series in which they are registered, or at times in only 60% of the series in which they are registered.[75]

Market makers receive certain benefits for carrying out their responsibilities. For example, a lender may extend credit to a broker-dealer without regard to the restrictions in Regulation T of the Board of Governors of the Federal Reserve System if the credit is used to finance the broker-dealer's activities as a specialist or market maker on a national securities exchange.[76] In addition, market makers are excepted from the prohibition in Section 11(a) of the Act. The Commission believes that a market maker must have sufficient affirmative obligations, including the obligation to hold itself out as willing to buy and sell options for its own account on a regular or continuous basis, to justify this favorable treatment. The Commission further believes that the rules of all U.S. options markets need not provide the same standards for market maker participation, so long as they impose affirmative obligations that are consistent with the Act. The Commission believes that NOM's market maker participation requirements impose sufficient affirmative obligations on NOM Market Makers and, accordingly, that NOM's requirements are consistent with the Act.

Nasdaq will open trading in an options series only if there is at least one Market Maker registered for trading in that series.[77] One commenter requests clarification of NOM's treatment of options series without a Market Maker. In particular, the commenter questions the actions NOM will take if a Market Maker withdraws from making markets in a series, including whether NOM will continue to match orders in the series.[78] In response, Nasdaq states that it is amending proposed Chapter IV, Section 5 to provide that, in the event a sole Market Maker for a series withdraws its registration and ceases making markets, NOM will place the series in a non-regulatory suspension and halt trading until such time as a member registers to make markets in that series.[79]

In addition, the commenter notes that the proposal does not address a Market Maker's use of the matching system for new customer orders after it has withdrawn as a Market Maker.[80] To the extent that the commenter is asking whether a Market Maker can enter a customer order when it is not quoting in a series in which it is registered, Nasdaq notes that the NOM Rules require that, if a Market Maker enters a bid in a series in which he is registered, he must also enter an offer,[81] and that therefore a Market Maker will not be able to enter customer orders without submitting a quote on the other side of the market from the customer order.[82] Further, Nasdaq notes that the NOM Rules prohibit a Market Maker from acting as an OEF without instituting appropriate information barriers.[83] To the extent that the commenter is asking whether an entity that withdraws as a Market Maker in a series can then act as an OEF in that series, Nasdaq notes that a Participant that has withdrawn as a Market Maker and is participating in NOM as an OEF would not receive favorable margin treatment under Regulation T.[84]

The Commission believes that Nasdaq has adequately clarified NOM's treatment of options series when either: (1) A registered Market Maker is not quoting in that series or (2) a registered Market Maker withdraws from registration in the series.

c. Single Market Maker Requirement

One commenter believes that Nasdaq should require at least two market makers for an options series to be listed and traded on NOM so that adequate depth and liquidity will be available to market participants.[85] The commenter

[67] *See* Nasdaq Response, *supra* note 5, at 3.

[68] *See* SIFMA Letter, *supra* note 4, at 2.

[69] *See* discussion *infra* notes 77 to 79 and accompanying text.

[70] *See* Nasdaq Response, *supra* note 5, at 3.

[71] *See* 15 U.S.C. 78c(a)(38) (definition of ''market maker'').

[72] The Commission notes that in approving the rules of the Boston Options Exchange (''BOX''), the Commission acknowledged that certain options series might not have continuous quotes disseminated by BOX, but concluded that the obligations imposed on market makers under the BOX Rules were consistent with the Act. The Commission also noted that the CBOE's Hybrid trading system had market maker obligations comparable to those proposed for BOX and also did not require market makers to quote all series. *See* Securities Exchange Act Release No. 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (order approving File No. SR–BSE–2002–15) (''BOX Approval Order'').

[73] *See* SIFMA Letter, supra note 4, at 2.

[74] *See* Nasdaq Response, supra note 5, at 5.

[75] *See id.* and BOX Rules, Chapter VI, Section 6(d)(i).

[76] 12 CFR 221.5(c)(6).

[77] *See* NOM Rules, Chapter IV, Section 5.

[78] *See* SIFMA Letter, *supra* note 4, at 2.

[79] *See* Nasdaq Response, *supra* note 5, at 3. Nasdaq further notes that, in Amendment No. 2, it proposes to clarify that in such circumstances, NOM will not execute orders on its book and will have no rights and privileges under the Linkage Plan to accept inbound orders from away markets. Nasdaq will continue to accept and route Participant orders that are designated for routing and execution at the best price in away markets. *Id.*

[80] *See* SIFMA Letter, *supra* note 4, at 2.

[81] *See* NOM Rules, Chapter VII, Section 6(b), which states that a Market Maker that enters a bid (offer) in a series in which he is registered on NOM must enter an offer (bid).

[82] *See* Nasdaq Response, *supra* note 5, at 4.

[83] *See* NOM Rules, Chapter VII, Section 10.

[84] *See* Nasdaq Response, *supra* note 5, at 4.

[85] *See* Amex Letter, *supra* note 4, at 2.

also believes that, in the context of the order exposure requirements established in Chapter VII, Section 14 of the NOM Rules,[86] there will not be meaningful order exposure with a ''trading crowd'' of fewer than two market makers.[87] In addition, the commenter believes that the term ''trading crowd'' may be a misnomer if the trading crowd consists of only one market maker.[88]

In response, Nasdaq asserts that neither the Act nor Commission rules require a market to provide for more than one market maker, and, in fact, the specialist system is an example of a one market maker market model.[89] Nasdaq believes that the NOM structure fulfills the objectives of Section 11A of the Act by providing a trading platform that will allow customer orders to meet without the intervention of a dealer.[90] Nasdaq further maintains that lower barriers to participation will attract liquidity and market depth from order entry firms and other market participants. Nasdaq also notes that it intends to provide an environment whereby robust competition between multiple market makers will provide depth and liquidity, but that it does not believe market participants should be prevented from trading directly with one another due to the absence of multiple dealers.[91]

The Commission agrees that the Act does not mandate a particular market model for national securities exchanges, and believes that many different types of market models could satisfy the requirements of the Act. The Commission does not believe that the Act requires an exchange to have market makers.[92] Although Market Makers could be an important source of liquidity on NOM, they likely will not be the only source. In particular, the NOM System is designed to match buying and selling interest of all Participants on NOM. The Commission therefore believes that the NOM structure is consistent with the Act.

D. NOM Trading System

1. Overview

NOM will be a fully automated electronic system (''System'') for trading standardized options, and will be a facility of Nasdaq, as defined in Section 3(a)(2) of the Act.[93] Participants will be able to enter Displayed Orders on NOM at single and multiple price levels for the following order types: [94] Market Orders; Limit Orders; Reserve Orders; [95] Minimum Quantity Orders; [96] Discretionary Orders; [97] and Price Improving Orders.[98] Participants may designate orders to be routed to other market centers when trading interest is not present on NOM or to be executed only on NOM.[99] Nasdaq also had originally proposed to allow Participants to enter Non-Displayed Orders.[100] Commenters expressed concerns about the use of Non-Displayed Orders in the options markets.[101] Nasdaq in Amendment No. 2 has proposed to eliminate Non-Displayed Orders.[102] Because Nasdaq has proposed to eliminate this order type, this order does not make any findings with respect to Non-Displayed Orders.

All trading interest on NOM will be automatically executable. The NOM System and rules provide for the ranking, display, and execution of all orders in price/time priority without regard to the status of the entity entering an order.[103] Displayed Orders will have priority over non-displayed interest at the same price.[104] Any price improvement resulting from an execution in the System will accrue to the party taking liquidity.[105]

[86] Amendment No. 2 renumbers this provision as Chapter VII, Section 12 of the NOM Rules.

[87] *See* Amex Letter, *supra* note 4, at 1.

[88] *Id.* at 2. Amex also questions the meaning of the term ''trading crowd'' in Chapter III, Section 4(f) of the NOM Rules. Nasdaq notes that it has deleted the term ''trading crowd'' from this rule to make clear that the electronic crowd will be composed of all NOM Participants, as is the case for other electronic markets. *See* Nasdaq Response, *supra* note 5, at note 9.

[89] *See* Nasdaq Response, *supra* note 5, at 8 to 9.

[90] *Id.* at 8.

[91] *Id.* at 9.

[92] In its release adopting Regulation ATS, the Commission rejected the suggestion that a guaranteed source of liquidity was a necessary component of an exchange. *See* Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) (''Regulation ATS Release''). *See also* Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (File No. SR–PCX–00–25) (order approving Archipelago Exchange as the equities trading facility of the Pacific Exchange), at Section IV.B.

[93] 15 U.S.C. 78c(a)(2). The System includes: (1) An order execution service that allows Participants to automatically execute transactions in securities listed and traded on NOM; (2) a trade reporting service that submits locked-in trades to a registered clearing agency for clearance and settlement, transmits last sale reports to the Options Price Reporting Authority, if required, for dissemination to the public and industry, and provides Participants with monitoring and risk management capabilities; and (3) a data feed(s) that can be used to display without attribution to Participants' MPIDs Displayed Orders on both the bid and offer side of the market for price levels within NOM using the minimum price variation applicable to the security. *See* NOM Rules, Chapter VI, Section 1(a). *See* Trading Rules Proposal Notice, *supra* note 3, for a more complete description of NOM operation and rules. The Commission notes that the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (''OPRA Plan'') requires each party to the plan to collect and promptly transmit to OPRA all last sale reports relating to its market. *See* OPRA Plan, Section V(a).

[94] NOM does not propose to trade complex orders at this time. Participants may enter orders with the following time-in-force designations: Expire Time; Immediate or Cancel (''IOC''); DAY; and Good Til Cancelled. *See* NOM Rules, Chapter VI, Section 1(g).

[95] A Reserve Order is a limit order with displayed size and an additional non-displayed amount, both of which are available for execution against incoming orders. If the displayed portion of a Reserve Order is executed fully, the System will replenish the display portion from reserve up to the size of the original display amount. The System creates a new time stamp for the replenished portion of an order each time it is replenished from reserve, while the reserve portion retains the time stamp of its original entry. *See* NOM Rules, Chapter VI, Section 1(e)(1).

[96] A Minimum Quantity Order must be designated as IOC and requires that a specified minimum number of contracts be traded. A Minimum Quantity Order received prior to the Opening Cross or after the market close will be cancelled. *See* NOM Rules, Chapter VI, Section 1(e)(3).

[97] A Discretionary Order has both a displayed price and size and a non-displayed discretionary price range at which the entering party is willing to buy or sell. The non-displayed interest is not entered into the System book but is converted, along with the displayed size, into an IOC buy (sell) order at the highest (lowest) price in the discretionary price range when displayed contracts become available on the opposite side of the market or an execution takes place at any price within the discretionary price range. If more than one Discretionary Order is available for conversion into an IOC order, the System will convert and process all such orders in the same order as they were entered. If an IOC order is not executed in full, the unexecuted portion of the order is reposted automatically and displayed in the System book with a new time stamp at its original displayed price and with its non-displayed discretionary price range. *See* NOM Rules, Chapter VI, Section 1(e)(4).

[98] A Price Improving Order is an order to buy or sell an option at a specified price smaller than the minimum price variation (''MPV'') in the security. Price Improving Orders may be entered in increments as small as one cent. A Price Improving Order will be displayed at the MPV in that security and rounded up for sell orders and down for buy orders. *See* NOM Rules, Chapter VI, Section 1(e)(6).

[99] *See* NOM Rules, Chapter VI, Section 11(a). *See also* Amendment No. 2 and the Trading Rules Proposal Notice, *supra* note 3, at 23871.

[100] A Non-Displayed Order was defined as a limit order that is not displayed in the System but is available for execution against all incoming orders until executed in full or cancelled.

[101] *See* Citadel Letter, *supra* note 4, at 3, and Amex Letter, *supra* note 4, at 2.

[102] Nasdaq has made corresponding changes throughout the NOM Rules to reflect the deletion of this order type.

[103] *See* NOM Rules, Chapter VI, Section 10. In Amendment No. 2, Nasdaq made a technical change to Chapter VI, Section 10 to clarify that the System will execute trading interest at the best price in the System before executing trading interest at the next best price. This change does not alter the execution algorithm as it was proposed. *See* Amendment No. 2.

[104] *See* NOM Rules, Chapter VI, Section 10(1). At each price, trading interest will be executed in the following order: (A) Displayed Orders; (B) the Non-Displayed portion of Reserve Orders, in time priority among such interest; and (C) the discretionary portion of Discretionary Orders, in time priority among such interest.

[105] *See* NOM Rules, Chapter VI, Section 10. One commenter maintains that the original proposal did not define ''taker of liquidity'' and failed to specify

Continued

The Commission believes that NOM's proposed execution priority rules are consistent with the Act. The Commission notes that one commenter specifically supported NOM's price/time priority algorithm, noting its belief that ''flat and open'' systems encourage better executions and provide increased liquidity to the market.[106] The Commission also believes that NOM's proposed order types are consistent with the Act, and discusses several particular order types below.

2. Attributable Orders

A Displayed Order may be entered with attribution to a Participant's MPID (an Attributable Order) or on an anonymous basis (a Non-Attributable Order).[107] One commenter expresses concern that Attributable Orders could result in discrimination against particular members.[108] The commenter believes, for example, that it is beneficial for a firm to identify itself when facilitating customer order flow since an exchange and its members may want to allow particular members to trade against more than the minimum guaranteed amount of the order to encourage the member to send more order flow to that exchange.[109]

The commenter also expressed concern that identifying the entering firm could encourage internalization. The commenter also asserts that Attributable Orders would defeat the anti-internalization function of the information barriers between a firm's market making and customer order entry activities.[110] The commenter believes that the internalization concern is particularly significant in the context of Nasdaq's ''first-in-first-out'' market model, where orders at a given price will be executed in sequence, with no priority for customer orders at the best price or pro rata distribution among participants quoting at that price. With no customer priority or pro rata allocation among Participants quoting at the best price, the commenter believes that a Participant that sees its firm's order at the top of the book would be able to execute against, and internalize, all of the displayed order.[111]

In its response letter, Nasdaq notes that Attributable Orders are a voluntary feature of the System, and that no firm will be required to reveal its identity.[112] Nasdaq also argues that there is no selective disclosure; Nasdaq will publish the identity of the NOM Participant only when the order is posted on the NOM book, and that disclosure will be made simultaneously to all market participants in a proprietary data feed.[113] Further, Nasdaq notes that information barriers are designed to prevent a Market Maker from obtaining and using information about customer orders prior to execution, and that OEFs must route customer orders to the best available market, even if that is the market displaying the firm's Attributable Order.[114] Nasdaq also believes that its price/time algorithm allows less internalization than ISE's pro rata allocation, which guarantees 40% of the order to a market maker under certain conditions. Nasdaq further notes that there is always the possibility that an incoming order trades with a Price Improving Order, rather than a displayed Attributable Order.

To the extent that a market participant is concerned that its order would be discriminated against, as Nasdaq notes, the market participant can choose to enter a Non-Attributable Order. In addition, the Commission does not believe that it is likely that participants in a fully electronic market, such as NOM, will refrain from trading with a particular Participant's Attributable Orders in order to allow that Participant to do so, particularly in light of their best execution obligations.

Moreover, the Commission does not believe that a member's use of Attributable Orders, by itself, will cause a Market Maker to violate NOM's information barrier rule. The purpose of requiring information barriers is to prohibit the flow of material non-public information between the market making activities and other business activities of a firm. With respect to Attributable Orders, a Market Maker will learn the identity of an Attributable Order at the same time as all other Participants—that is, once it is displayed on NOM and disseminated over NOM's proprietary data feed. The Market Maker will not have any knowledge of the order prior to that time. The Commission does not believe that allowing Market Makers to see this information once it is posted on the book undermines the policy of having information barriers. The Commission might reach a different conclusion, however, if order attribution information were disclosed preferentially to certain Participants or if Market Makers had a systemic or other advantage that allowed them to receive this information in a more timely manner.

3. Reserve Orders and Price Improving Orders[115]

Nasdaq proposes to allow participants to enter Reserve Orders, which are limit orders with displayed size and an additional non-displayed amount, both of which are available for execution against incoming orders. If the displayed portion of a Reserve Order is executed fully, the System will replenish the display portion from reserve up to the size of the original display amount. The non-displayed portion of a Reserve Order has lower priority than any displayed order.

In addition, Nasdaq proposes a new order type called a Price Improving Order. A Price Improving Order has a specified price smaller than the minimum price variation (''MPV'') in the option. Price Improving Orders may be entered in increments as small as one cent. Price Improving Orders will be displayed at the MPV in that security and rounded up for sell orders and down for buy orders. For the reasons discussed below, the Commission finds Reserve Orders and Price Improving Orders consistent with the Act.

a. Quote Rule

One commenter argues that Price Improving Orders would violate Rule 602 of Regulation NMS (the ''Quote Rule'') because Nasdaq will not disseminate its best bid or offer.[116]

The Quote Rule requires a national securities exchange to collect, process, and make available to vendors the best bid, the best offer, and aggregate quotation sizes for each subject security that is communicated on any national securities exchange by a responsible broker or dealer. A ''bid'' or ''offer'' is defined as ''the bid price or the offer price communicated by a member of a national securities exchange or member of a national securities association to any broker or dealer, or to any customer.

how price improvement would accrue to the taker of liquidity. *See* Amex Letter, *supra* note 4, at 3. In response, Amendment No. 2 modifies NOM's rules to indicate that any price improvement will accrue to the party removing liquidity previously posted to the Book. *See* NOM Rules, Chapter VI, Section 10(3). The Commission believes that this change clarifies NOM's rules and is consistent with the Act.

[106] *See* GETCO Letter, *supra* note 4, at 1.

[107] *See* NOM Rules, Chapter VI, Section 1(d).

[108] *See* ISE Letter, *supra* note 4, at 2.

[109] *Id.* at note 3.

[110] *Id.* at 2–3.

[111] *Id.* at 3.

[112] *See* Nasdaq Response, *supra* note 5, at 7.

[113] *Id.*

[114] *Id.*

[115] Nasdaq has proposed in Amendment No. 2 to eliminate the Non-Displayed Order type. Therefore, this approval order does not discuss Non-Displayed Orders. *See supra* notes 100 to 102 and accompanying text.

[116] *See* ISE Letter, *supra* note 4, at 2 (incorporating by reference the commenter's June 1, 2007, letter from Michael J. Simon, Secretary, ISE, to Nancy M. Morris, Secretary, Commission, regarding File No. SR–CBOE–2007–39 (''ISE June 2007 Letter'')).

* * * '' [117] Because the non-displayed size of a Reserve Order or the non-displayed price of a Price Improving Order is sent to NOM but not communicated to anyone, it is not a bid, offer, or quotation. Thus, the Quote Rule does not require this information to be disseminated.[118]

The Quote Rule also requires responsible brokers and dealers to be firm for their quotes.[119] In Amendment No. 2 Nasdaq has proposed to modify Chapter VII, Section 6(c)(1) of the NOM Rules to explicitly state that all quotes and orders entered into NOM by Options Participants, including the non-displayed portions of Reserve Orders and Price Improving Orders, must be firm under NOM rules and Rule 602 of Regulation NMS.

b. Transparency, Quote Competition, and Internalization

Several commenters expressed concern about the impact of Price Improving Orders and Reserve Orders on market quality. In particular, one commenter believes such orders will undermine transparency in the options markets and that, because the prices and sizes of such orders are not disseminated, it will be impossible for market participants to know the true best trading interest on NOM.[120] This commenter argues that Price Improving Orders will discourage market participants from quoting their best prices and submitting displayable limit orders because contra-side orders could be ''pennied'' by Price Improving Orders at opportune moments. The commenter believes that these disincentives ultimately will reduce price competition in the U.S. options markets.[121] Another commenter expresses a concern that no one will know the actual prices communicated to the exchange, which are prices at which transactions can take place.[122] This commenter is concerned that if other options markets adopted similar order types, there would be a trading environment in which there would be no way for customers to make intelligent pricing decisions or for broker-dealers to fulfill their best execution obligations.[123]

One commenter expresses the concern that Price Improving Orders will enable Participants to internalize their order flow without the possibility of real order interaction. This commenter argues that the purpose of the requirement that a member display a customer order and wait three seconds before trading against the order is to provide other market participants with a chance to trade with the order before the member internalizes it. The commenter argues that, because only the Participant that enters the Price Improving Order will know the true price of the order, only that member can accurately run its pricing model to determine whether it is economically viable to trade against the order. The commenter does not believe this is a level playing field.[124] Similarly, another commenter asserts that permitting Price Improving Orders to satisfy NOM's order exposure requirement [125] will ''invite rampant internalization'' by Participants, who will be able to trade with their agency orders without the market having a meaningful opportunity to compete for the orders.[126]

On the other hand, another commenter asserts that the use of non-displayed and reserve orders, which have been available for years in the equity markets, has not diminished competition or liquidity in these markets.[127] This commenter believes that Reserve Orders will encourage liquidity providers to bring their interest to the market in a manner best suited to their trading requirements. The commenter further believes that the increased use of reserve orders in the options markets would help to mitigate concerns regarding the effect of penny increments on institutional investors.[128]

Price Improving Orders will allow market participants to submit an order priced between the MPV that will be rounded to the nearest MPV for display.[129] Without this order type, market participants would not be able to submit orders priced between the MPV. Instead, orders, if submitted, would be priced (and displayed) at the MPV. Thus, the Price Improving Order type will not ''take away'' transparency that would already exist. The Commission recognizes that Price Improving Orders will not be displayed at their actual penny price. Price Improving Orders, however, will provide for investors the opportunity to trade at a better price than would otherwise be available—inside the disseminated best bid and offer for a security. The Commission believes that this opportunity for investors to receive executions inside the disseminated best bid or offer could result in better executions for investors, and that Price Improving Orders are consistent with the Act.

In response to a commenter's concern about broker-dealers' ability to fulfill their best execution obligations,[130] as just discussed, the Commission believes that Price Improving Orders likely will provide another opportunity for investors to receive executions inside the disseminated best bid or offer for a security, which could result in better executions for investors. The availability of this price improvement feature will be a factor to be considered in a broker-dealer's best execution routing determination, similar to other factors a broker-dealer must consider in connection with its best execution obligation.

The duty of best execution requires a broker-dealer to seek the most favorable terms reasonably available under the circumstances for a customer's transaction.[131] The Commission has not viewed the duty of best execution as requiring automated routing on an order-by-order basis to the market with the best quoted price at that time. Rather, the duty of best execution requires broker-dealers to periodically assess the quality of competing markets

[117] 17 CFR 242.600(a)(8).

[118] *See also* Citadel Letter, *supra* note 4, at 4 supporting this analysis.

[119] 17 CFR 242.602(b)(2) and (c)(3).

[120] *See* Citadel Letter, *supra* note 4, at 1–3.

[121] *See* Citadel Letter, *supra* note 4, at 3. The commenter further believes that the concerns raised by Hidden Orders exceed those raised by the auction facilities on other options exchanges (including BOX's PIP and the International Securities Exchange's PIM) because Hidden Orders would be a fundamental component of NOM rather than a separate auction facility operating parallel to the regular options market. *Id.*

[122] *See* ISE Letter, *supra* note 4, at note 1–2.

[123] *Id.* at 2.

[124] *See* ISE June 2007 Letter, *supra* note 116, at 3.

[125] *See* NOM Rules, Chapter VII, Section 12. Chapter VII, Section 12 of the NOM Rules prohibits a Participant from executing as principal an order it represents as agent unless (1) the order is exposed on NOM for at least three seconds, or (2) the Participant has been bidding or offering on NOM for at least three seconds prior to receiving the agency order that is executable against such bid or offer.

[126] *See* Citadel Letter, *supra* note 4, at 3. This commenter further argues that Nasdaq should amend Chapter VII, Section 12, Commentary .04 to provide that a Participant cannot inform another Options Participant or any other third party of the terms of an order submitted to NOM after, as well as prior to, submitting the order to NOM. Nasdaq has made this change in Amendment No. 2.

[127] *See* GETCO Letter, *supra* note 4, at 2–3.

[128] *Id.* at 3. The commenter also notes that the Commission previously approved a reserve order type for NYSE Arca Options, citing to NYSE Arca Options Rule 6.62(c)(3). *Id.* at note 6 and accompanying text.

[129] Price Improving Orders are defined as orders to buy or sell at a specified increment smaller than the MPV in a security, and they may be entered in increments as small as one cent. *See* NOM Rules, Chapter VI, Section 1(e)(6). Because a Price Improving Order can only be entered in an increment smaller than the MPV in an options series, and cannot be entered in an increment smaller than one cent, Participants will not be able to enter Price Improving Orders in options series for which the MPV is a penny.

[130] *See* ISE Letter, *supra* note 4, at note 1–2.

[131] *See, e.g.*, Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996) (''Order Handling Rules Release'').

to assure that order flow is directed to markets providing the most beneficial terms for their customer orders.[132] Broker-dealers must examine their procedures for seeking to obtain best execution in light of market and technology changes and modify those practices if necessary to enable their customers to obtain the best reasonably available terms.[133] In doing so, broker-dealers must take into account price improvement opportunities, and whether different markets may be more suitable for different types of orders or particular securities.[134]

The Commission also believes that Price Improving Orders will provide market participants with an additional tool to submit trading interest to the Exchange. This order type may serve to increase liquidity to the extent that market participants find the order type to be useful and result in better executions. Further, market participants may be incented to compete by putting forth their best price—priced in a penny increment—to potentially match or better any other Price Improving Orders resident in the System. This may result in more aggressive, rather than less aggressive, trading interest.

The Commission also believes that Reserve Orders will provide market participants with an additional tool to submit trading interest to the exchange. Specifically, the ability to enter an order with a certain size displayed and additional size not displayed may provide market participants greater choice to submit trading interest in a manner best suited to their trading needs. This in turn may encourage market participants to bring liquidity to the exchange that they might not otherwise have submitted.

Moreover, the Commission believes that the ability to ''fish'' inside the displayed quote, coupled with the restriction on the Participant that initially submitted the Price Improving Order from trading with that order until after three seconds has elapsed, will provide a meaningful opportunity for interaction prior to the time at which the submitting Participant can interact with the order. The Commission also notes that a Participant that would like to trade against its customer order runs the risk that the customer order, if entered as a Price Improving Order, will execute against another Price Improving Order (or Discretionary Order) resident in the system. The Commission does not believe that the availability and use of Price Improving Orders will reduce the quality or competitiveness of the options markets by increasing the level of internalization in the options markets.

c. Linkage Plan

One commenter believes that the Trading Rules Proposal fails to address how Reserve Orders and Price Improving Orders will interact with the requirements of the Plan for the Purpose of Creating and Operating an Intermarket Options Linkage (''Linkage Plan'').[135] Specifically, this commenter notes that, because such orders are not disseminated, they presumably will not trigger other options markets' obligations to avoid trading through or obligate other markets to send orders to NOM through the Linkage.[136] Accordingly, the commenter believes that away markets will fail to benefit from superior prices available on NOM, and Non-Displayed Orders and Price Improving Orders will undermine market-wide trade-through protection.[137]

In its response, Nasdaq states that incoming orders from the intermarket linkage will interact with Price Improving Orders. Such incoming orders will automatically execute against any such order with a better price than the displayed bid or offer.[138]

The Commission believes that NOM's Rules adequately address how its market will interact with the Linkage Plan. The Linkage Plan, and SRO rules adopted pursuant to the Plan, provide trade through protection to the national best bid and offer (''NBBO'').[139] The NBBO will not include the non-displayed price of a Price Improving Order or the reserve size of a Reserve Order. Therefore, the non-displayed price of a Price Improving Order and the non-displayed size of a Reserve Order are not subject to trade through protection under the Linkage Plan.

d. Penny Pilot

One commenter believes that the Trading Rules Proposal will circumvent the industry efforts with respect to the Penny Pilot Program by moving to hidden penny quoting without the benefit of careful study of the data yielded in the Pilot.[140] Another commenter believes that the appropriate way to address penny pricing in options is through the current Penny Pilot. This commenter recommends that the Commission consider any expansion of penny quoting only through review of the experience under the Pilot.[141]

As discussed above and below, the Commission finds that the Trading Rules Proposal, as amended, is consistent with the Act. The Commission previously has approved proposals by other options exchanges to trade in penny increments.[142] The Commission does not believe it is appropriate to prohibit Nasdaq from implementing another initiative designed to allow limited trading, not quoting, in penny increments.

4. Opening and Halt Cross

Nasdaq had originally proposed a single price opening and reopening via an electronic cross, modeled on the Opening and Halt Crosses Nasdaq developed for the trading of equities.[143] Nasdaq in Amendment No. 2 proposes to revise the procedures it will use to resume trading in an option following the conclusion of a trading halt in the underlying security. Specifically, rather than using a single price reopening following a trading halt, as originally

[132] Order Handling Rules Release, 61 FR at 48322–48333 (''In conducting the requisite evaluation of its internal order handling procedures, a broker-dealer must regularly and rigorously examine execution quality likely to be obtained from different markets or market makers trading a security.''). *See also Newton* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 135 F.3d 266, at 271, 274 (3d Cir.), *cert. denied,* 525 U.S. 811 (1998); Payment for Order Flow, Securities Exchange Act Release No. 34902 (October 27, 1994), 59 FR 55006, at 55009 (November 2, 1994).

[133] Order Handling Rules, 61 FR at 48323.

[134] Order Handling Rules, 61 FR at 48323. For example, in connection with orders that are to be executed at a market opening price, ''[b]roker-dealers are subject to a best execution duty in executing customer orders at the opening, and should take into account the alternative methods in determining how to obtain best execution for their customer orders.'' Disclosure of Order Execution and Routing Practices, Securities Exchange Act Release No. 43590 (November 17, 2000), 65 FR 75414, 75422 (December 1, 2000) (adopting new Exchange Act Rules 11Ac1–5 and 11Ac1–6 and noting that alternative methods offered by some Nasdaq market centers for pre-open orders included the mid-point of the spread or at the bid or offer).

[135] *See* Citadel Letter, *supra* note 4, at 3. Another commenter generally states its belief that the concept of a Non-Displayed Order is inconsistent with the obligations required by the Linkage Plan. *See* Amex Letter, *supra* note 4, at 2.

[136] *See* Citadel Letter, *supra* note 4, at 3.

[137] *Id.*

[138] *See* Nasdaq Response, *supra* note 5, at 13.

[139] The national best bid or offer is defined in the Linkage Plan as the national best bid and offer in an options series calculated by a Participant. *See* Section 2(19) of the Linkage Plan.

[140] *See* Citadel Letter, *supra* note 4, at 4.

[141] *See* ISE June 2007 Letter, *supra* note 116, at 3.

[142] *See, e.g.*, Securities Exchange Act Release Nos. 54229 (July 27, 2006), 71 FR 44508 (August 3, 2006) (File No. SRSR–CBOE–2005–90) (order approving CBOE's Simple Auction Liaison system); 50819 (December 8, 2004), 69 FR 75093 (December 15, 2004) (File No. SR–ISE–2003–06) (order approving ISE's Price Improvement Mechanism); and BOX Approval Order, *supra* note 72 (approving BOX's Price Improvement Period).

[143] *See* NOM Rules, Chapter VI, Section 8. *See* Trading Rules Proposal Notice, *supra* note 3, for a detailed description of the proposed Opening and Halt Crosses.

proposed, Nasdaq proposes to process orders in time priority according to the execution algorithm provided in the NOM Rules.[144] According to Nasdaq, the proposal to use NOM's regular processing following a trading halt is designed to respond to comments from industry participants that options prices are based on the prices of the underlying security.[145]

The Commission believes that NOM's rules for an Opening Cross will help to ensure that the opening of NOM is conducted in a fair and orderly fashion and is consistent with the Act. The Commission further believes that the proposed change to NOM's procedure for re-opening trading in an option following the conclusion of a trading halt in the underlying security is reasonably designed to provide for an orderly re-opening of trading in the option and is consistent with the Act.

5. Closing Cross

At the close of trading, NOM will conduct a single price Closing Cross.[146] One commenter notes that the rules, as originally proposed, provided that the Closing Cross for all options would occur at 4 p.m., although options on fund shares and broad-based indexes trade until 4:15 p.m., and did not indicate when the Closing Cross would terminate.[147] In response, Nasdaq in Amendment No. 2 revised Chapter VI, Section 9(b) of the NOM Rules to indicate that the Closing Cross for options on broad-based indexes and fund shares will occur at 4:15 p.m. In addition, Nasdaq indicated that the Closing Cross occurs automatically and generally takes place in under one second, although the process may take several seconds on high-volume trading days.[148] The Commission believes that these changes adequately clarify the timing of the Closing Cross.[149]

One commenter notes that the NOM Rules indicate that an MOC order might not be executed. The commenter believes that an MOC order is a market order, and the operation of the Closing Cross will alter the nature of a market order as generally understood by market participants. The commenter further believes that Nasdaq should better explain the operation of MOC orders.[150] In response, Nasdaq acknowledges that MOC orders are not guaranteed to execute during the Closing Cross but notes that MOC orders receive the highest execution priority during the Closing Cross process.[151] Thus, Nasdaq states that MOC orders should execute at the cross price provided that there is adequate trading interest on the other side of the market.[152]

As noted above, the NOM Closing Cross is modeled on the Closing Cross that Nasdaq uses in its equity market.[153] Like the NOM Closing Cross, the Nasdaq Closing Cross includes MOC orders, which might not be executed during the Nasdaq Closing Cross.[154] The Commission believes that NOM's rules adequately explain the operation of MOC orders.

Nasdaq proposes to disseminate in connection with the Opening Cross and Closing Cross an Order Imbalance Indicator.[155] The Order Imbalance Indicator for the Closing Cross will disseminate, in part, the following information: (1) A Current Reference Price, which is the single price that is at or within the current NOM best bid and offer at which the maximum number of contracts of MOC, LOC, IO, and Close Eligible Interest[156] can be paired;[157] (2) a Far Clearing Price, which is an indicative price at which MOC, LOC, and IO orders would execute if the Closing Cross were to occur at that time; and (3) a Near Clearing Price, which is an indicative price at which MOC, LOC, IO, and Close Eligible Interest would execute if the Closing Cross were to occur at that time.[158]

One commenter notes that the Order Imbalance Indicator would show the price in penny increments at which certain orders would execute at the time the Order Imbalance Indicator is disseminated.[159] The commenter believes that the Order Imbalance Indicator is inconsistent with the options Penny Pilot Program and that the Order Imbalance Indicator should be disseminated in the applicable minimum price variation for an option, rather than in penny increments.[160]

In its response, Nasdaq states that the Order Imbalance Indicator will benefit investors and improve transparency by providing market participants with information that will allow them to route customer orders to the best market.[161] To ensure that the Order Imbalance Indicator fully complies with Rule 602 of Regulation NMS, however, Nasdaq proposes in Amendment No. 2 to modify the proposed NOM Rules relating to the Closing Cross to state that the Current Reference Price and Near Clearing Price[162] will be disseminated in the minimum price increment applicable to the option in question and never at a price that would expose undisplayed trading interest that is available for execution on the NOM Book. Nasdaq states that only the Current Reference Price and Near Clearing Price are affected by this restriction because they are the only aspects of the Order Imbalance Indicator that may include information based on non-displayed orders resting on the NOM book.[163] Nasdaq further states that the remaining data elements of the Order Imbalance Indicator do not transmit information regarding the

[144] *See* NOM Rules, Chapter VI, Section 10(4).

[145] *See* Amendment No. 2 at 7.

[146] *See* NOM Rules, Chapter VI, Section 9. *See also* Trading Rules Proposal Notice, *supra* note 3, for a more detailed description of the proposed Closing Cross.

[147] *See* Amex Letter, *supra* note 4, at 3.

[148] *See* Nasdaq Response, *supra* note 5, at 10.

[149] In Amendment No. 2, Nasdaq proposes changes to the definitions of Imbalance Only (''IO''), Market on Close (''MOC''), and Limit on Close (''LOC'') orders to replace certain times specified in the rules (*e.g.*, 3:50:00 p.m.) with more general descriptions (*e.g.*, 10 minutes prior to the close).

[150] *See* Amex Letter, *supra* note 4, at 3.

[151] *See* Nasdaq Response, *supra* note 5, at 10 to 11. *See also* NOM Rules, Chapter VI, Section 9(b)(3).

[152] *See* Nasdaq Response, *supra* note 5, at 11.

[153] *See* Nasdaq Rule 4754.

[154] *See* Nasdaq Rule 4754(b)(3).

[155] *See* proposed Chapter VI, Sections 8(a)(2) and 9(a)(7) of the NOM Rules. For the Opening Cross, Nasdaq will disseminate the Order Imbalance Indicator every five seconds beginning at 9:25 a.m. For the Closing Cross, Nasdaq will disseminate the Order Imbalance Indicator every five seconds for 10 minutes prior to the Closing Cross. *See* proposed NOM Rules, Chapter VI, Sections 8(a)(2) and 8(b)(1) and 9(a)(7) and 9(b)(1) for a detailed description of the Order Imbalance Indicator.

[156] Close Eligible Interest is defined to mean any quotation or any order that may be entered into the system and designated with a time-in-force of DAY, GTC, or EXPR. *See* proposed Chapter VI, Section 9(a)(1) of NOM Rules.

[157] If more than one price exists pursuant to this calculation, the Current Reference Price is the price that minimizes any Imbalance. If more than one price exists under that calculation, the Current Reference Price is the entered price at which contracts will remain unexecuted in the cross. And, if more than one price exists under that calculation, the Current Reference Price is the price that minimizes the distance from the bid-ask midpoint of the inside quotation prevailing within the NOM System at the time of the order imbalance indicator dissemination. *See* proposed Chapter VI, Section 9(a)(7)(A) of the NOM Rules.

[158] For the Opening Cross, the Far Clearing Price and Near Clearing Price will be the same as the Current Reference Price. *See* proposed Chapter VI, Section 8(a)(2)(A) and (E) of the NOM Rules.

[159] *See* Amex Letter, *supra* note 4, at 2.

[160] *Id.* The Penny Pilot Program of the various options exchanges allows the exchanges to quote certain options classes in one-cent or five-cent increments, depending on the price of the option. *See, e.g.*, Securities Exchange Act Release No. 56567 (September 28, 2007), 72 FR 56396 (October 3, 2007) (order approving File No. SR–Amex–2007–96).

[161] *See* Nasdaq Response, *supra* note 5, at 9.

[162] *See* NOM Rules, Chapter VI, Sections 9(a)(7)(A) and 9(a)(7)(E)(ii).

[163] This is because the Current Reference Price and Near Clearing Price take into account the Close Eligible Interest, which is defined as any quotation or any order that may be entered into the System and designated with a time-in-force of DAY, GTC, or EXPR. Thus, Close Eligible Interest includes orders, including non-displayed orders, on the NOM Book.

pricing of specific orders and therefore do not implicate Rule 602 of Regulation NMS.[164]

The Commission agrees with Nasdaq's analysis and believes that the Order Imbalance Indicator, as proposed to be amended in Amendment No. 2, is consistent with Rule 602 of Regulation NMS. Nasdaq will not disseminate the prices of non-displayed orders resting on the NOM book after the Opening Cross [165] and therefore, such non-displayed orders will not be bids or offers [166] required to be made available to vendors by the Exchange under Rule 602. Further, the Commission does not believe that the Order Imbalance Indicator, as amended, is inconsistent with the Penny Pilot because it will not make available during regular trading hours information in a pricing increment other than the MPV.

6. Obvious Errors

The Commission believes that in most circumstances trades that are executed between parties should be honored. On rare occasions, the price of the executed trade indicates an ''obvious error'' may exist, suggesting that it is unlikely that the parties to the trade had come to a meeting of the minds regarding the terms of the transaction. In the Commission's view, the determination of whether an ''obvious error'' has occurred should be based on specific and objective criteria and subject to specific and objective procedures.[167]

In Amendment No. 2, Nasdaq revised its proposed rule dealing with options obvious errors. Specifically, Nasdaq amended Chapter V, Section 6, Obvious Errors, to: (1) Apply the obvious error rule solely to obvious price errors and to series quoted no bid; (2) streamline the procedures governing review of obvious error requests by the Market Operations Review Committee (''MORC''); and (3) add a provision stating that the MORC must include representatives of one member engaged in market making and two industry representatives not engaged in market making, and that at no time shall members engaged in market making constitute more than 50% of the MORC. The Commission believes that the provisions of Nasdaq's obvious error rule, as revised by Amendment No. 2, are consistent with the Act and, in particular, with Section 6(b)(5), in that they provide clear and objective standards and procedures for determining whether an obvious error has occurred. The Commission also believes that the revised proposed rule is consistent with obvious error rules previously approved by the Commission for other exchanges.[168]

One commenter seeks clarification as to who will be responsible for trade errors in the context of the Linkage.[169] Nasdaq states that NOM's Rules recognize only Obvious Errors, as defined in Chapter VI, Section 6 of the NOM Rules. If a trade does not meet the definition of an Obvious Error, NOM will take no action with respect to the trade. In the event of an Obvious Error on NOM involving an away market, the away market is authorized as a party to the transaction to file with NOM for review of the Obvious Error. In the event of an Obvious Error on an away market, NOM's Obvious Error rule authorizes NOM to file for review of that Obvious Error on behalf of the NOM Participant. If necessary, NOM will file for such review through NOS or the member of the away market which it used to route the order.[170]

7. Miscellaneous

One commenter believes that, under the NOM Rules, quotes are the same as orders and therefore reads Chapter VI, Section 5(b) of the NOM Rules to mean that Nasdaq proposes to trade all options series on NOM in penny increments, in violation of the Penny Pilot Program.[171]

In response, Nasdaq states that the commenter has misread the proposal and that Nasdaq does not propose to quote all options on NOM in penny increments. In this regard, Nasdaq notes that Chapter VI, Section 5(a) of the NOM Rules governs quotation increments and is consistent with the Penny Pilot Program, while Section 5(b) specifies the minimum trading increment on NOM.[172] The Commission believes that Nasdaq has clarified that it does not propose to quote all options on NOM in penny increments and that the NOM Rules are consistent with the Penny Pilot Program. The Commission also does not believe that trading in penny increments is inconsistent with the Penny Pilot Program.[173]

In response to questions from commenters regarding the NOM closing time,[174] Nasdaq in Amendment No. 2 proposes to modify the NOM Rules to provide that the NOM closing time will be 4 p.m. ET, except for options on broad-based indexes and Fund Shares, which will close at 4:15 p.m. ET.[175] The Commission believes that these modifications will make NOM's closing time consistent with the rules of the other U.S. options exchanges.[176]

E. Order Routing

With respect to securities traded on NOM (''System Securities''), [177] Participants may designate orders to be routed to another market center when trading interest is not available on NOM or to execute only on NOM.[178] Orders that are designated to be routed will be routed to another options market when NOM is not at the NBBO, consistent with the locked and crossed market and trade through provisions of the Linkage Plan.[179] Orders routed by the System to other markets do not retain time priority with respect to other orders in the System and the System will continue to execute other orders while routed orders are away at another market center.[180] If a routed order is returned, in whole or in part, that order (or its remainder) will receive a new time stamp reflecting the time of its return to the System.[181] Participants whose orders are routed to

[164] *See* Nasdaq Response, *supra* note 5, at 6 and 9.

[165] The Commission does not believe that the Order Imbalance Indicator disseminated prior to the Opening Cross (and thus disseminated prior to the 9:30 a.m. EST) raises the same issues under the Quote Rule because the information will be disseminated prior to the commencement of trading on the exchange. *See* Rule 602(a)(1)(i)(B) of Regulation NMS, 17 CFR 242.602(a)(1)(i)(B).

[166] *See* Rule 600(b)(8) of Regulation NMS, 17 CFR 242.600(b)(8).

[167] *See, e.g.*, Securities Exchange Act Release Nos. 54608 (October 16, 2006), 71 FR 62021 (October 20, 2006) (File No. SR–Amex–2005–60) (order approving changes to Amex's obvious error rule); 47628 (April 3, 2003), 68 FR 17697 (April 10, 2003) (File No. SR–CBOE–00–55) (order approving CBOE Direct); and BOX Approval Order, *supra* note 72.

[168] *See, e.g.*, Securities Exchange Release Nos. 54228 (July 27, 2006), 71 FR 44066 (August 3, 2006) (File No. SR–ISE–2006–14) (approving current version of ISE Rule 7.20 (options obvious error rule)); 54070 (June 29, 2006), 71 FR 38441 (July 6, 2006) (File No. SR–Phlx–2005–73) (approving current version of Phlx Rule 1092 (options obvious error rule)); and 56487 (September 20, 2007), 72 FR 54956 (September, 27, 2007) (File No. SR–CBOE–2007–04) (approving current version of CBOE Rule 6.25 (options obvious error rule)).

[169] *See* SIFMA Letter, *supra* note 4 at 2.

[170] *See* Nasdaq Response, *supra* note 5, at 9, and Amendment No. 2.

[171] *See* Amex Letter, *supra* note 4, at 2.

[172] *See* Nasdaq Response, *supra* note 5, at 7.

[173] *See supra* note 142 and accompanying text.

[174] *See* Amex Letter, *supra* note 4, at 4, and SIFMA Letter, *supra* note 4, at 2.

[175] *See* NOM Rules, Chapter VI, Section 2.

[176] *See, e.g.*, ISE Rule 700 and CBOE Rules 6.1 and 24.6. In addition, in Amendment No. 2 Nasdaq proposes to revise Chapter VI, Section 2 of the NOM Rules to indicate that the System will be available to accept bids, offers, and orders beginning at 9 a.m., rather than 8 a.m. Similarly, Nasdaq proposes in Amendment No. 2 to revise Chapter VI, Section 9 of the NOM Rules to indicate that IO orders, LOC orders, and MOC orders may be entered beginning at 9 a.m., rather than 8 a.m.

[177] *See* NOM Rules, Chapter VI, Section 1(b).

[178] *See* NOM Rules, Chapter VI, Section 11(a) and Amendment No. 2.

[179] *See id.* and *infra* note 195 and accompanying text.

[180] *See* NOM Rules, Chapter VI, Section 11(c).

[181] *Id.*

away markets will be obligated to honor such trades to the same extent they will be obligated to honor a trade executed on NOM.[182]

One commenter believes that NOM's rules, as proposed, provided different order routing attributes for ''system'' and ''non-system'' securities, but failed to adequately define these terms, resulting in confusion regarding the operation of the order routing mechanism.[183]

In response, Nasdaq, in Amendment No. 2, proposes to revise proposed Chapter VI, Section 1(b) of the NOM Rules to define ''System Securities'' as all options currently trading on NOM, and to define ''Non-System Securities'' as all other options. Nasdaq states it will accept orders in Non-System Securities for routing but will not execute these orders in the System.[184] Nasdaq represents that System and Non-System Securities will be identified clearly via the NOM data feed and in a daily list posted on the NOM Web site.[185] Nasdaq further states that the System will be programmed to differentiate between System Securities and Non-System Securities and will process each in accordance with the NOM Rules.[186] The Commission believes that Nasdaq's proposed changes and response adequately clarify the operation of the order routing mechanism for ''System Securities'' and ''Non-System Securities.''

In Amendment No. 2, Nasdaq further proposes to amend proposed Chapter VI, Section 11(e) of the NOM Rules to establish Nasdaq Options Services LLC (''NOS'') as NOM's exclusive order router. NOS will perform only two functions, the routing of orders with respect to System Securities and the routing of orders with respect to Non-System Securities. Nasdaq states that NOS will be a facility of Nasdaq only with respect to the routing of orders for System Securities.[187] NOS will be programmed to follow the algorithm and order type instructions established in the NOM Rules and will not have discretion to change the terms of an order or the order routing instructions.[188]

NOS will be a member of an SRO unaffiliated with Nasdaq that is its designated examining authority, and NOM will establish and maintain procedures and internal controls reasonably designed to restrict the flow of confidential and proprietary information between Nasdaq and its facilities, including NOS, and any other entity.[189] In addition, the books, records, premises, officers, directors, agents, and employees of NOS, as a facility of Nasdaq, will be deemed to be those of the Exchange for purposes of and subject to oversight pursuant to the Act.[190] Further, Participants are not required to use NOS to route orders, and a Participant may route its orders through any available router it selects.[191]

The Commission agrees with the Exchange that routing with respect to System Securities will be a ''facility'' of the Exchange, and, consequently, the operation of NOS in this capacity will be subject to Exchange oversight, as well as Commission oversight. The Commission notes that the functionality to be provided by NOS is not the exclusive means for accessing better-priced orders in other market centers. Accordingly, NOS's routing services are optional, and a NOM Participant is free to route its orders to other market centers through alternative means. In light of the protections discussed above, including the regulation of NOS as a facility of the Exchange with respect to the routing of orders for System Securities, the Commission believes that Nasdaq's rules and procedures regarding the use of NOS to route orders to away markets are consistent with the Act.[192]

F. Linkage

As described above, Nasdaq proposes to use NOS to route orders to other options exchanges. NOM will, however, participate in the Linkage Plan to receive orders from options exchanges that use the Linkage to route orders. To receive orders through the Linkage, Nasdaq proposes to adopt rules relating to the Linkage Plan that are substantially similar to the rules of the other options exchanges that participate in the Linkage Plan. In general, the proposed rules include relevant definitions; establish the conditions pursuant to which Market Makers may enter Linkage orders; impose obligations on the Exchange regarding how it must process incoming Linkage orders; establish a general standard that Participants should avoid trade-throughs; establish potential regulatory liability for Participants that engage in a pattern or practice of trading through other exchanges; and establish obligations with respect to locked and crossed markets.[193]

One commenter questioned how NOM will ensure that orders designated for execution solely on NOM will not create a trade-through or locked or crossed market. In particular, the commenter requests clarification regarding the treatment of an order that locks or crosses the NBBO, NOM's responsibility for such an order, and the action NOM will take if the market already is locked or crossed when it receives an order.[194]

In response, Nasdaq states that Chapter VI, Section 7(b)(3)(C) of the NOM Rules sets forth the procedures that NOM will use to ensure compliance with the trade through and locked and crossed market provisions of the Linkage Plan.[195] Nasdaq proposes in Amendment No. 2 to state explicitly in the NOM Rules that an order will not be executed at a price that trades through another market or displayed at a price that would lock or cross another market. Nasdaq further proposes to add in Amendment No. 2 that an order that is designated as routable will be routed in compliance with applicable trade through and locked and crossed markets restrictions.[196] With respect to non-routable orders, Nasdaq notes that the System will re-price a Displayed Order that, at the time of entry, would cause a locked or crossed market or a trade through violation, to the current national best offer (for bids) or the current national best bid (for offers) and display the order at one minimum price variation below (for bids) or above (for offers) the national best price.[197] These

[182] *See* NOM Rules, Chapter VI, Section 11(d).

[183] *See* Amex Letter, *supra* note 4, at 3.

[184] *See* Nasdaq Response, *supra* note 5, at 11. *See* also NOM Rules, Chapter VI, Section 11(a).

[185] *See* Nasdaq Response, *supra* note 5, at 11.

[186] *Id.*

[187] *See* NOM Rules, Chapter VI, Section 11(e) and Nasdaq Response, *supra* note 5, at 11.

[188] *See* Nasdaq Response, *supra* note 5, at 11.

[189] *See* NOM Rules, Chapter VI, Section 11(e).

[190] *Id.* In addition, the books and records of NOS, as a facility of the Exchange, will be subject at all times to inspection and copying by the Exchange and the Commission. *Id.*

[191] *See* Nasdaq Response, *supra* note 5, at 11. *See also* NOM Rules, Chapter VI, Section 1(b) (allowing Participants to designate orders as available for routing or not available for routing).

[192] In addition, the Commission notes that the Nasdaq rules and procedures applicable to NOS are similar to the rules and procedures adopted by other exchanges to govern their order routers. *See, e.g.*, ISE Rule 2108; NYSE Rule 17; and Phlx Rule 185(g).

[193] *See* NOM Rules, Chapter XII.

[194] *See* Amex Letter *supra* note 4, at 3.

[195] *See* Nasdaq Response, *supra* note 5, at 10.

[196] *See* NOM Rules, Chapter VI, Section 7(b)(3)(C).

[197] *See* NOM Rules, Chapter VI, Section 7(b)(3)(C). As originally proposed, Chapter VI, Section 7(b)(3)(C) of the NOM Rules provided that if a Displayed Order that the entering party has elected not to make eligible for routing would cause a locked or crossed market or a trade through violation at the time of entry, the System would re-price the order to one minimum price variation (''MPV'') below the current national best offer (for bids) or one MPV above the current national best bid (for offers). In Amendment No. 2, Nasdaq proposes to revise the rule to provide that the System will re-price such an order to the current

Continued

do-not-ship orders will remain on Nasdaq's book until cancelled or executed by another NOM Participant or market center.[198] Nasdaq states that the System, therefore, will systemically avoid executing an order at a price that would trade through a price on another market and will prevent Nasdaq from displaying a quotation that would lock or cross a quotation displayed by another market.[199] In addition, Nasdaq represents that it will program the System to avoid joining a locked or crossed market when the market is already locked or crossed.[200]

The Commission believes that Nasdaq has responded adequately to the commenter's questions regarding NOM's procedures and rules for complying with the Linkage Plan, and that NOM's rules, as amended, are reasonably designed to comply with the locked and crossed market and trade through provisions of the Linkage Plan.

As noted above, Nasdaq intends to use NOS to route orders to other markets. To allow Nasdaq to use the Linkage to send orders to other markets, if it wanted to do so, NOM Rules provide that one Options Market Maker per eligible series will be designated as the ''InterMarket Linkage Market Maker'' or ''ILM'' to be responsible for P/A and Satisfaction orders that would be sent to away markets through the Linkage for options trading on NOM. The ILM responsible for such orders will be required to adhere to the responsibilities of an Eligible Market Maker, as set forth in the Linkage Plan.[201]

The ILM will be required to act with due diligence with regard to the interests of orders entrusted to it and fulfill other duties of an agent, including, but not limited to, ensuring that such orders, regardless of their size or source, receive proper representation and timely execution in accordance with the terms of the orders and the rules of the Exchange. The ILM must provide NOM with written instructions for the routing of any P/A orders it may send through the InterMarket Linkage. NOM will immediately route all P/A orders on behalf of the ILM according to these instructions.[202]

One commenter seeks clarification as to who would fulfill the role of the ILM if the ILM is excused temporarily from its responsibilities, and who would be responsible for trade throughs.[203]

In response, Nasdaq states that it intends to use NOS to fulfill Nasdaq's order routing obligations under the Linkage Plan.[204] Although Nasdaq believes that it therefore will rarely, if ever, need to appoint an ILM, Nasdaq notes that Chapter VII, Rule 5(a)(ix) of the NOM Rules provides Nasdaq with the ability to designate a market maker as the ILM for a particular series.[205] In the event that the ILM substantially fails to engage in a course of dealings under this rule, Nasdaq Regulation may bring a disciplinary action.[206] In addition, Nasdaq states that neither Nasdaq or any Participant will face liability for trade throughs because NOM is programmed to comply with the requirements of the Linkage Plan. If NOM has a System malfunction that results in a trade through, Nasdaq believes that such an occurrence would fall under the exception in Section 8(c)(iii) of the Linkage Plan. If Nasdaq receives a Satisfaction Order from an away market, NOM will execute the order against trading interest available on the NOM Book.[207]

The Commission notes that NOM's rules and the NOM System are designed to comply with the requirements of the Linkage Plan, including the trade through requirements. The Commission believes that the proposed NOM rules regarding the Intermarket Linkage are consistent with the requirements of the Linkage Plan and the Act. The Commission reminds Nasdaq, however, that to the extent trades are executed on NOM that do not comply with the trade through requirements of the Linkage Plan, Nasdaq, as a Plan Participant, will have the obligation to comply with the requirements of the Linkage Plan, including responding to Satisfaction Orders. Further, before Nasdaq can begin operating NOM, Nasdaq must become a participant in the Linkage Plan.

G. Strike Prices

Nasdaq proposes to participate in the $2.50 Strike Price Program[208] and in the $1 Strike Price Program.[209] Amendment No. 2 proposes to amend the NOM Rules to reflect the expansion of the $2.50 Strike Price Program to include strike prices between $50 and $75 under certain conditions and to indicate that NOM's $1 Strike Price Program will expire on June 5, 2008, rather than June 5, 2007.[210] These changes conform NOM's rules to the existing rules of the other options markets.[211]

One commenter believes that the terms of NOM's participation in the $2.50 Strike Price Program and the $1 Strike Price Program are unclear.[212] In particular, the commenter questions whether NOM will trade only those classes currently included in the $2.50

national best offer (for bids) or the current national best bid (for offers) and display the order at one MPV below (for bids) or above (for offers) the national best price. Nasdaq believes that the procedure proposed in Amendment No. 2 is superior to the original procedure, which would have converted the re-priced order into a Non-Displayed Order.

[198] *See* Nasdaq Response, *supra* note 5, at 10.

[199] *Id.*

[200] *Id.*

[201] *See* NOM Rules, Chapter VII, Section 5(a)(ix). The ILM will perform substantially similar functions that the BOX InterMarket Linkage Market Maker performs on BOX. *See* BOX Rules, Chapter VI, Section 5(a)(ix), and Chapter XII.

[202] The order would be generated automatically by NOM and routed to the away exchange with the required clearing information included. Each execution received from an away exchange would result in the automatic generation of a trade execution on NOM between the original order and the ILM.

[203] *See* SIFMA Letter, *supra* note 4, at 2.

[204] *See* Nasdaq Response, *supra* note 5, at 4.

[205] *See* Nasdaq Response, *supra* note 5, at 4. The Commission notes that if there is no Market Maker registered in a particular series, NOM will place that series in a non-regulatory suspension and halt trading until such time as a member registers to make markets in that series. *See supra* note 79 and accompanying text.

[206] *See* NOM Rules, Chapter VII, Section 5(c).

[207] *See* Nasdaq Response, *supra* note 5, at 4.

[208] The $2.50 strike price program allows the options exchanges to list options in up to 200 classes at $2.50 strike price intervals for strike prices greater than $25 but less than $75. *See, e.g.*, Securities Exchange Act Release Nos. 40662 (November 12, 1998), 63 FR 64297 (November 19, 1998) (order approving File Nos. SR–Amex–98–21; SR–CBOE–98–29; SR–PCX–98–31; and SR–Phlx–98–26) (''1998 Order'') and 52893 (December 5, 2005), 70 FR 73488 (December 12, 2005) (order approving File No. SR–Amex–2005–067). The 200 classes eligible for the $2.50 Strike Price Program were allocated among the options exchanges pursuant to a formula approved by the Commission as part of the permanent approval of the program. Each options exchange may list options with $2.50 strike price intervals on any options class that another exchange selects as part of its program. Any modification to the $2.50 Strike Price Program would require the filing of a proposed rule change with the Commission pursuant to Section 19(b) of the Act.

[209] Under the $1 Strike Price Program, each options exchange may select a total of five individual stocks on which options series may be listed at $1 intervals, and each exchange may list $1 strikes on any options class designated by another exchange as part of its $1 Strikes Program. *See, e.g.*, Securities Exchange Act Release No. 55714 (May 7, 2007), 72 FR 26853 (May 11, 2007). *See* NOM Rules, Chapter IV, Section 6, Supplementary Material .03 and Supplementary Material .02. The Commission notes that several of the options exchanges have amended their rules, in part, to allow the exchanges to select a total of ten individual stocks on which options series may be listed at $1 intervals. *See, e.g.*, Securities Exchange Act Release Nos. 57049 (December 27, 2007), 73 FR 528 (January 8, 2008) (order approving File No. SR–CBOE–2007–125) and 57110 (January 8, 2008) (notice of filing and order granting accelerated approval of File No. SR–Amex–2007–141) (together, the ''1 Strike Price Orders'').

[210] *See* NOM Rules, Chapter IV, Section 6, Supplementary Material .03(b) and Supplementary Material .02.

[211] The Commission notes that several of the options exchanges have recently amended their rules to make the $1 Strike Price Program permanent. *See, e.g.*, $1 Strike Price Orders, *supra* note 209.

[212] *See* Amex Letter, *supra* note 4, at 3–4.

Strike Price Program and in the $1 Strike Price Program.[213] NOM's rules provide that it may list $1 strikes in options classes on five individual stocks, as designated by NOM, as well as any options class specifically designated by another exchange that employs a similar $1 strike price program.[214] NOM's rules also provide that Nasdaq may list series at $2.50 strike price intervals in any multiply traded option once another exchange has selected that option to be a part of the program.[215] The Commission believes that Nasdaq's proposal, as amended, makes clear that NOM will participate in the $2.50 Strike Price Program and the $1 Strike Price Program on the same terms and conditions as the other options exchanges.[216] The Commission also believes that Nasdaq's proposed rules relating to the $2.50 Strike Price and $1 Strike Price Programs will provide investors with flexibility in tailoring their options positions to meet their investment objectives while avoiding the unnecessary proliferation of illiquid options series.[217]

H. Securities Traded on NOM

Nasdaq proposes to adopt initial and continued listing standards for equity and index options [218] that are substantially similar to the listing standards adopted by other options exchanges.[219] In Amendment No. 2, Nasdaq proposes to revise proposed Chapter IV, Section 3 of the NOM Rules to allow NOM to list and trade an option on an underlying equity security that does not satisfy certain of the criteria for initial listing in the NOM Rules provided that: (1) The underlying security meets the criteria for continued listing set forth in the NOM Rules; and (2) options on such underlying security are listed and traded on at least one other registered national securities exchange.[220] This proposed change to the proposed NOM Rules, which is narrowly tailored to address the circumstances where an equity option class is currently ineligible for initial listing on NOM even though it meets NOM's continued listing standards and is trading on another options exchange, is substantially similar to rules adopted by other options exchanges.[221]

The Commission believes that NOM's proposed initial and continued listing standards, as amended, are consistent with the Act, including Section 6(b)(5), in that they are designed to protect investors and the public interest and to promote just and equitable principles of trade. Nasdaq's operation of NOM as an options exchange, however, is conditioned on Nasdaq becoming a Plan Sponsor in the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options Submitted Pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act of 1934 (''OLPP''). In addition, Nasdaq will need to become a participant in the Options Clearing Corporation.

I. Regulation of NOM and Options Participants

Nasdaq represents that it has the ability to discharge all regulatory functions related to the facility that it has undertaken to perform by virtue of forming NOM as a facility of Nasdaq.[222] In connection with its regulatory functions, the Exchange represents that its regulatory oversight committee and its chief regulatory officer (''CRO'') will assume responsibility for regulating quoting and trading on NOM and conduct by NOM participants.[223] The Exchange's CRO has general supervision of the regulatory operations of the Exchange, including overseeing surveillance, examination, and enforcement functions, and administers a regulatory services agreement (''Regulatory Contract'') between the Exchange and FINRA.[224]

Pursuant to the Regulatory Contract, FINRA will perform many of the initial disciplinary processes on behalf of the Exchange. Additionally, the Exchange's By-Laws and rules provide that it has disciplinary jurisdiction over its members so that it can enforce its members' compliance with its rules and the federal securities laws.[225] The Exchange's rules also permit it to sanction members for violations of its rules and violations of the federal securities laws by, among other things, expelling or suspending members, limiting members' activities, functions, or operations, fining or censuring members, or suspending or barring a person from being associated with a member.[226] Nasdaq's Rules also provide for the imposition of fines for minor rule violations in lieu of commencing disciplinary proceedings.[227]

Furthermore, the Exchange has an independent regulatory department, Nasdaq Regulation, which carries out many of the Exchange's regulatory functions, including administering its membership and disciplinary rules, and is functionally separate from the Exchange's business lines. Nasdaq Regulation includes Market Watch, which performs real-time intraday surveillance over all Exchange-listed companies and all Exchange market participants. The Exchange represents that Nasdaq Regulation, including Market Watch, will perform the same

[213] *Id.* at 4.

[214] *See* NOM Rule, Chapter IV, Section 6, Supplementary Material .02(a).

[215] *See* NOM Rule, Chapter IV, Section 6, Supplementary Material .03(a).

[216] As noted above, several of the options exchanges have recently expanded and made permanent their $1 Strike Price Programs. *See supra* notes 209 and 211.

[217] *See, e.g.* 1998 Order, *supra* note 208, and Securities Exchange Act Release Nos. 47991 (June 5, 2003), 68 FR 35243 (June 12, 2003) (File No. SR–CBOE–2001–60) (order approving CBOE's $1 Strike Price Program through June 5, 2004) and 48024 (June 12, 2003), 68 FR 36617 (June 18, 2003) (File No. SR–Amex–2003–36) (order approving Amex's $1 Strike Price Program through June 5, 2004).

[218] *See* NOM Rules, Chapters IV and XIV.

[219] *See, e.g.*, BOX Rules, Chapters IV and XIV. In response to a commenter's concern that its proposed definition of ''index option'' could have included exchange-traded funds, as well as index options (*see* Amex Letter, *supra* note 4, at 4), Nasdaq proposes in Amendment No. 2 to revise its definition ''index option'' to mean an option on a broad-based, narrow-based, or micro narrow-based index of equity securities prices. *See* NOM Rules, Chapter I, Section 1(a)(21). The Commission finds that the proposed change is consistent with the Act because it clarifies the definition of ''index option.'' In addition, Nasdaq proposes in Amendment No. 2 to revise Chapter IV, Section 5 of the NOM Rules to indicate that if an options class has been approved for listing on NOM and there is not at least one series in that class open for trading, the listing will be placed in a non-regulatory suspension until a series is opened in that class.

[220] *See* NOM Rules, Chapter IV, Section 3(k) and Amendment No. 2. Nasdaq also proposes to state that it shall employ the same procedures to determine whether a particular underlying security meets NOM's continued equity options listing criteria in this instance as it employs when determining whether an underlying security meets NOM's initial listing criteria. *See id.*

[221] *See, e.g.*, Amex Rule 915, Commentary .01(6); CBOE Rule 5.3, Interpretation and Policy .01(c); and ISE Rule 502(b)(6).

[222] *See* Corporate Structure Proposal Notice, *supra* note 8, at 58138.

[223] *See* Corporate Structure Proposal Notice, *supra* note 8, at 58139.

[224] Pursuant to the RSA, FINRA performs certain regulatory functions on behalf of the Exchange. In addition to performing certain membership functions for the Exchange, FINRA performs certain disciplinary and enforcement functions for the Exchange. Generally, FINRA investigates members, issue complaints, and conducts hearings pursuant to the Exchange's rules. Appeals of disciplinary hearings, however, will be handled by the Nasdaq Review Council. *Id.*

[225] *See e.g.* Exchange By-Laws, Article IX, Section 2.

[226] *See e.g.* Exchange Rule 8310. Nasdaq rules apply to Options Participants and the trading of options contracts on NOM. *See* NOM Rules, Chapter I, Section 2. Prospective Options Participant must, among other things, be an existing member or become a member of the Exchange, pursuant to the Nasdaq 1000 Rule Series, as well as maintain a membership on at least one other options national securities exchange. *See* NOM Rules, Chapter II, Sections 1(b)(iii) and 2(f).

[227] *See infra* notes 243 to 250 and accompanying text.

regulatory role with respect to NOM, including operating automated detection systems to perform real-time surveillance of quoting and trading on NOM and to maintain a fair and orderly market.[228] Specifically, Nasdaq Regulation will perform options listing regulation and will monitor trading on the NOM on a real-time basis to identify unusual trading patterns and determine whether particular trading activity requires further regulatory investigation by FINRA. In addition, Nasdaq Regulation will oversee the process for determining and implementing trading halts, identifying and responding to unusual market conditions, and administering Nasdaq's process for identifying and remediating ''obvious errors'' by and among Options Participants. The NOM rules governing halts, unusual market conditions, extraordinary market volatility, and audit trail are modeled on the approved rules of BOX.[229]

The Commission finds that the Exchange's proposed rules and regulatory structure with respect to NOM are consistent with the requirements of the Act, and in particular with Section 6(b)(1) of the Act, which requires an exchange to be so organized and have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the Act and the rules and regulations thereunder, and the rules of the Exchange,[230] and with Sections 6(b)(6) and 6(b)(7) of the Act,[231] which require an Exchange to provide fair procedures for the disciplining of members and persons associated with members.

1. Regulatory Contract

The Exchange represents that the Regulatory Contract between the Exchange and FINRA governs the Exchange and its facilities. Therefore, because NOM will be a facility of Nasdaq, the Regulatory Contract will govern NOM.[232] The Exchange and FINRA, however, have modified the Regulatory Contract to capture certain aspects of regulation of NOM and the regulation and discipline of Options Participants.[233] The Commission notes that Nasdaq will continue to bear ultimate regulatory responsibility for functions performed on Nasdaq's behalf under the Regulatory Contract. Further, the Exchange retains ultimate legal responsibility for the regulation of its members (including those members that are NOM Participants) and its market (including its facility, NOM).

The Commission believes that it is consistent with the Act to and the public interest to allow the Exchange to contract with FINRA to perform membership, disciplinary, and enforcement functions.[234] Membership, discipline, and enforcement are fundamental elements to a regulatory program, and constitute core self-regulatory functions. It is essential to the public interest and the protection of investors that these functions are carried out in an exemplary manner. With respect to certain regulatory functions contracted to FINRA by the Exchange, including membership, disciplinary and enforcement functions, the Commission noted in the Registration Approval Order its belief that FINRA has the expertise and experience to perform such functions on behalf of the Exchange, and that the contracting of such functions to FINRA is consistent with the Act and the public interest.[235] The Commission continues to believe this is true with respect to the inclusion in the Regulatory Contract of regulation of NOM and the conduct of NOM Participants.

At the same time, the Exchange, unless relieved by the Commission of its responsibility,[236] bears the responsibility for self-regulatory conduct and primary liability for self-regulatory failures, not the SRO retained to perform regulatory functions on the Exchange's behalf.[237] In performing these functions, however, FINRA may nonetheless bear liability for causing or aiding and abetting the failure of the Exchange to perform its regulatory functions.[238] Accordingly, although FINRA will not act on its own behalf under its SRO responsibilities in carrying out these regulatory services for Nasdaq relating to the operation of NOM, FINRA also may have secondary liability if, for example, the Commission finds the contracted functions are being performed so inadequately as to cause a violation of the federal securities laws by Nasdaq.[239]

2. 17d–2 Agreement

Rule 17d–2 allows SROs to file with the Commission plans under which the SROs allocate among themselves the responsibility to receive regulatory reports from, and examine and enforce compliance with, specified provisions of the Act and rules thereunder and SRO rules by firms that are members of more than one SRO (''common members''). An SRO that is a party to an effective 17d–2 plan is relieved of regulatory responsibility as to any common member for whom responsibility is allocated under the plan to another SRO.[240]

All of the options exchanges, the NASD, and the NYSE have entered into the Options Sales Practices Agreement, a Rule 17d–2 agreement (''17d–2 Agreement'' or ''Agreement''). This Agreement allocates to certain SROs (''examining SROs'') regulatory responsibility for common members with respect to certain options-related sales practice matters. For example, the Agreement allocates responsibility to conduct options-related sales practice examinations of a firm, and investigate

[228] *See* Corporate Structure Proposal Notice, *supra* note 8, at 58139.

[229] *See* BOX Rules, Chapter V.

[230] 15 U.S.C. 78f(b)(1).

[231] 15 U.S.C. 78f(b)(6) and (b)(7).

[232] The Commission notes that the NOM Proposed Rules provide that ''NOM rules that refer to Nasdaq Regulation, Nasdaq Regulation staff, NOM staff, and NOM departments should be understood as also referring to [National Association of Securities Dealers, Inc. (''NASD'') (n/k/a Financial Industry Regulatory Authority, Inc. or FINRA)], NASD staff, NASD Regulation staff, and NASD departments acting on behalf of Nasdaq pursuant to the Regulatory Contract.'' *See* NOM Rules, Chapter 1, Article 3.

[233] Nasdaq and FINRA are parties to an agreement pursuant to Section 17(d) of the Act and Rule 17d–2 thereunder, dated July 11, 2006 (''Bilateral 17d–2 Agreement''). A regulatory matter involving a NOM Participant that is also a FINRA member that is governed by both the Regulatory Contract and the Bilateral 17d–2 Agreement will be administered by FINRA pursuant to the Bilateral 17d–2 Agreement, not the Regulatory Contract. Telephone conversation between Jeffrey S. Davis, Vice President and Deputy General Counsel, Nasdaq, and Heather Seidel, Assistant Director, Division of Trading and Markets (''Division''), Commission, on December 21, 2007.

[234] *See e.g.*, Regulation ATS Release, *supra* note 92. *See also* Securities Exchange Act Release Nos. 50122 (July 29, 2004), 69 FR 47962 (August 6, 2004) (order approving File No. SR–Amex–2004–32) (''Amex Approval Order''); 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (File No. 10–127) (approving ISE's registration as a national securities exchange) (''ISE Exchange Registration Order'') at III(D)(2); and Registration Approval Order, *supra* note 19.

[235] *See* Registration Approval Order, *supra* note 19, at notes 10 and 11 and accompanying text.

[236] *See* Section 17(d)(1) of the Act and Rule 17d–2 thereunder. 15 U.S.C. 78q(d)(1); and 17 CFR 240.17d–2. *See also infra* note 240 and accompanying text. The Commission notes that it is not approving the Regulatory Contract.

[237] *See* Registration Approval Order, *supra* note 19, at notes 112 and 113 and accompanying text; Amex Approval Order, *supra* note 234; and ISE Registration Approval Order, *supra* note 234, at III(D)(2).

[238] *Id.*

[239] *Id.*

[240] Rule 17d–2 provides that any two or more SROs may file with the Commission a plan for allocating among such SROs the responsibility to receive regulatory reports from persons who are members or participants of more than one of such SROs to examine such persons for compliance, or to enforce compliance by such persons, with specified provisions of the Act, the rules and regulations thereunder, and the rules of such SROs, or to carry out other specified regulatory functions with respect to such persons. 17 CFR 240.17d–2.

options-related customer complaints and terminations for cause of associated persons of that firm. The Commission notes that Nasdaq has become a party to the 17d–2 Agreement,[241] which will cover Nasdaq members acting as Options Participants.[242]

3. Minor Rule Violation Plan

The Commission approved Nasdaq's Minor Rule Violation Plan (''MRVP'') in 2006.[243] Nasdaq's MRVP specifies those uncontested minor rule violations with sanctions not exceeding $2,500 that would not be subject to the provisions of Rule 19d–1(c)(1) under the Act[244] requiring that an SRO promptly file notice with the Commission of any final disciplinary action taken with respect to any person or organization.[245] Nasdaq's MRVP includes the policies and procedures included in Nasdaq Rule 9216(b), ''Procedure for Violations under Plan Pursuant to SEC Rule 19d–1(c)(2),'' and the rule violations included in Nasdaq IM–9216, ''Violations Appropriate for Disposition Under Plan Pursuant to SEC Rule 19d–1(c)(2).''

The Trading Rules Proposal, as originally filed, included Chapter X, Section 7 of the NOM Rules, ''Penalty for Minor Rule Violations,'' which lists the options rules that Nasdaq intended to include in its MRVP. However, the Trading Rules Proposal did not propose a corresponding amendment to Nasdaq IM–9216 to include the rules in proposed Chapter X, Section 7 of the NOM Rules in Nasdaq's MRVP. Accordingly, in Amendment No. 2, Nasdaq proposes to amend Nasdaq IM–9216 to include proposed Chapter X, Section 7 of the NOM Rules.[246] The Commission believes that this change is consistent with the Act because it clarifies that the proposed rules listed in Chapter X, Section 7 of the NOM Rules will be included in Nasdaq's MRVP.

The Commission notes that the rules included in Chapter X, Section 7 of the NOM Rules are similar to the rules included in the MRVPs of other options exchanges.[247] The Commission finds that Nasdaq's MRVP, as amended to include the rules listed in Chapter X, Section 7 of the NOM Rules, is consistent with Sections 6(b)(1), 6(b)(5) and 6(b)(6) of the Act, which require, in part, that an exchange have the capacity to enforce compliance with, and provide appropriate discipline for, violations of the rules of the Commission and of the exchange.[248] In addition, because Nasdaq Rule 9216(b) will offer procedural rights to a person sanctioned for a violation listed in Chapter X, Section 7 of the NOM Rules, the Commission believes that Nasdaq's rules provides a fair procedure for the disciplining of members and associated persons, consistent with Section 6(b)(7) of the Act.[249]

The Commission also finds that the proposal to include the rules listed in Chapter X, Section 7 of the NOM Rules in Nasdaq's MRVP is consistent with the public interest, the protection of investors, or otherwise in furtherance of the purposes of the Act, as required by Rule 19d–1(c)(2) under the Act,[250] because it should strengthen Nasdaq's ability to carry out its oversight and enforcement responsibilities as an SRO in cases where full disciplinary proceedings are unsuitable in view of the minor nature of the particular violation.

In approving the proposed change to Nasdaq's MRVP, the Commission in no way minimizes the importance of compliance with NOM rules and all other rules subject to the imposition of fines under Nasdaq's MRVP. The Commission believes that the violation of any SRO rules, as well as Commission rules, is a serious matter. However, the Nasdaq MRVP provides a reasonable means of addressing rule violations that do not rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handling certain violations. The Commission expects that Nasdaq will continue to conduct surveillance with due diligence and make a determination based on its findings, on a case-by-case basis, whether a fine of more or less than the recommended amount is appropriate for a violation under Nasdaq's MRVP or whether a violation requires a formal disciplinary action under the Nasdaq Rule 9200 Series.

J. Quote Mitigation

Nasdaq originally proposed a rule that would provide for the bundling of certain order and quote updates sent to OPRA for low volume options that have been listed on NOM for more than ten trading days.[251] In Amendment No. 2, Nasdaq proposes to eliminate the rule as proposed and provide that: (1) On a monthly basis, NOM will determine the average daily volume (''ADV'') of each series listed on NOM and delist the current series and not list the next series after expiration where the ADV is less than 100 contracts;[252] (2) NOM will implement a ''replace on queue'' functionality that will monitor outgoing messages and will not send a message that is about to be sent if a more current message for the same series is available for sending;[253] (3) NOM will prioritize price update messages and send out price updates before sending size update messages; and (4) when the size associated with a bid or offer increases by an amount less than or equal to a percentage (never to exceed 20%) of the size associated with a previously disseminated bid or offer, NOM will not disseminate the new bid or offer.[254] Nasdaq also represents that when NOM detects that a Participant is disseminating significantly more quotes than is normal for that Participant, NOM will contact that Participant and alert it to such activity. Such monitoring may reveal that the Participant may have internal system issues or incorrectly-set system parameters that are not immediately apparent. NOM believes that, even without uncovering problems, alerting a Participant to possible excessive quoting will lead the

[241] The Commission today is approving an amendment to the 17d–2 Agreement that adds Nasdaq as a party to the Agreement. *See* Securities Exchange Act Release No. 57481 (March 12, 2008) (File No. S7–966).

[242] NOM rules contemplate participation in this Agreement by requiring that any Options Participant that transacts business with Public Customers also be a member of at least one of the examining SROs. *See* NOM Rules, Chapter XI, Section 1.

[243] *See* Securities Exchange Act Release No. 53623 (April 10, 2006), 71 FR 19769 (April 17, 2006) (File No. 4–514) (''MRVP Order'').

[244] 17 CFR 240.19d–1(c)(1).

[245] The Commission adopted amendments to paragraph (c) of Rule 19d–1 to allow SROs to submit for Commission approval plans for the abbreviated reporting of minor disciplinary infractions. *See* Securities Exchange Act Release No. 21013 (June 1, 1984), 49 FR 23829 (June 8, 1984). Any disciplinary action taken by an SRO against any person for violation of a rule of the SRO which has been designated as a minor rule violation pursuant to such a plan filed with the Commission will not be considered ''final'' for purposes of Section 19(d)(1) of the Act if the sanction imposed consists of a fine not exceeding $2,500 and the sanctioned person has not sought an adjudication, including a hearing, or otherwise exhausted his administrative remedies.

[246] In the MRVP Order, the Commission noted that Nasdaq proposed that any amendments to IM–9216 made pursuant to a rule filing submitted under Rule 19b–4 of the Act would automatically be deemed a request by Nasdaq for Commission approval of a modification to its MRVP. *See* MRVP Order, *supra* note 243, at note 6.

[247] *See*, *e.g.*, BOX Rules, Chapter X, Section 2, and ISE Rule 1614.

[248] 15 U.S.C. 78f(b)(1), 78f(b)(5) and 78f(b)(6).

[249] 15 U.S.C. 78f(b)(7).

[250] 17 CFR 240.19d–1(c)(2).

[251] The period for which updates would be bundled would not have exceeded one second. This rule was based on a similar rule of BOX. *See* BOX Rules, Chapter V, Section 32.

[252] The ADV refers to the ADV on NOM. Telephone conversation between Heather Seidel, Assistant Director, Division of Trading and Markets, and Jeffrey S. Davis, Vice President and Deputy General Counsel, Nasdaq, on January 9, 2008.

[253] This functionality will be applied in real time and will not delay the sending of any messages.

[254] *See* NOM Rules, Chapter VI, Section 17.

Participant to take steps to reduce the number of its quotes.[255]

The Commission notes that several of the options exchanges have adopted similar rules that provide for the delisting of options classes when the ADV of the class falls below a certain threshold.[256] In addition, Nasdaq's proposal to not disseminate a new bid or offer when the size associated with a bid or offer increases by an amount less than or equal to a percentage (never to exceed 20%) of the size associated with a previously disseminated bid or offer is substantially similar to a Phlx rule previously approved by the Commission.[257] Further, Nasdaq's monitoring strategy is substantially similar to a policy adopted by ISE.[258] The Commission also believes that Nasdaq's proposed ''replace on queue'' functionality and its proposal to prioritize price update messages and send out price updates before sending size update messages are reasonable measures to attempt to mitigate quote message traffic because they will more efficiently provide for the dissemination of the most recent quote information.

Although Nasdaq's rules do not include a ''holdback timer'' or similar quote mitigation strategy like those adopted by four of the other options exchanges,[259] the Commission believes that the totality of Nasdaq's proposed market structure, market making obligations, and quote mitigation strategies are comparable to the quote mitigation efforts of the other options markets. More specifically, Nasdaq has proposed to allow Market Makers to register by series, as opposed to class. As noted above, the Commission believes that this will permit Market Makers to select the options series in which they are most interested. This is designed to reduce the number of quotes submitted by such Market Makers, and therefore likely will help to mitigate NOM's quote message traffic and capacity.[260] In addition, NOM Rules provide that a market maker's continuous quoting obligations will not be applicable in options series until the time to expiration is less than nine months.[261]

Further, Nasdaq has proposed that it will open at least one expiration month for each class of option open for trading on NOM, and a minimum of one series of options in that class.[262] These requirements provide for fewer mandatory expiration months and series than the rules of other options exchanges, and may therefore contribute to less quote message traffic on NOM to the extent that NOM has fewer series open for trading. And, as detailed above, Nasdaq has proposed four quote mitigation strategies, several of which are substantially similar to those in place at other markets.

K. Section 11(a) of the Act

Section 11(a)(1) of the Act[263] prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion (collectively, ''covered accounts'') unless an exception applies. Rule 11a2–2(T)[264] under the Act, known as the ''effect versus execute'' rule, provides exchange members with an exemption from the Section 11(a)(1) prohibition. Rule 11a2–2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute transactions on the exchange. To comply with Rule 11a2–2(T)'s conditions, a member: (i) Must transmit the order from off the exchange floor; (ii) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution;[265] (iii) may not be affiliated with the executing member; and (iv) with respect to an account over which the member has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the Rule.

In a letter to the Commission, Nasdaq requests that the Commission concur with Nasdaq's conclusion that Participants that enter orders into NOM satisfy the requirements of Rule 11a2–2(T).[266] For the reasons set forth below, the Commission believes that Participants entering orders into NOM would satisfy the conditions of the Rule.

The Rule's first condition is that orders for covered accounts be transmitted from off the exchange floor. The NOM System receives orders electronically through remote terminals or computer-to-computer interfaces. In the context of other automated trading systems, the Commission has found that the off-floor transmission requirement is met if a covered account order is transmitted from a remote location directly to an exchange's floor by electronic means.[267] Because the NOM System receives orders electronically through remote terminals or computer-to-computer interfaces, the Commission

[255] *See* Amendment No. 2 at 9.

[256] *See* Securities Exchange Act Release Nos. 55161 (January 24, 2007), 72 FR 4754 (February 1, 2007) (File No. SR–ISE–2006–62) (ISE Penny Pilot Approval Order) (approving ISE policy to delist equity options with an ADV of less than 20 contracts, but noting that ISE's current policy is to do so for options with an ADV of less than 50 contracts); 55162 (January 24, 2007), 72 FR 4738 (February 1, 2007) (File No. SR–Amex–2006–106) (Amex Penny Pilot Approval Order) (approving Amex policy to delist options classes with an ADV of less than 25 contracts); 55154 (January 23, 2007), 72 FR 4743 (February 1, 2007) (File No. SR–CBOE–2006–92) (CBOE Penny Pilot Approval Order) (approving CBOE policy to delist equity option classes with an ADV of less than 20 contracts); and 56154 (July 27, 2007), 72 FR 43303 (August 3, 2007) (File No. SR–CBOE–2007–85) (approving an exception to CBOE's delisting policy if the option class scheduled for delisting experiences a significant increase in trading volume).

[257] *See* Securities Exchange Act Release No. 55153 (January 23, 2007), 72 FR 4553 (January 31, 2007) (File No. SR–Phlx–2006–74) (order approving, in part, a Phlx rule providing that it will disseminate an updated bid or offer when, among other things, the size associated with it's bid or offer increases by an amount greater than or equal to a percentage (never to exceed 20%)).

[258] *See* ISE Penny Pilot Approval Order, *supra* note 256. *See also* CBOE Penny Pilot Approval Order and Amex Penny Pilot Approval Order, *supra* note 256.

[259] *See* Amex Penny Pilot Approval Order, CBOE Penny Pilot Approval Order, and ISE Penny Pilot Approval Order, *supra* note 256; and Securities Exchange Act Release No. 55155 (January 23, 2007), 72 FR 4741 (February 1, 2007) (File No. SR–BSE–2006–49) (approving BOX's Penny Pilot program).

[260] *See supra* notes 57 to 58 and accompanying text.

[261] *See* NOM Rules, Chapter IV, Section 8(a). *See also* CBOE Rule 8.7; PHLX Rule 1014(b)(ii)(D)(4); and Amex Rules 993–ANTE(c)(ii) and 994–ANTE(c)(iv).

[262] *See* NOM Rules, Chapter IV, Sections 6(b) and 6(e). In Amendment No. 2, Nasdaq proposes to revise Chapter IV, Section 6(b) of the NOM Rules to provide that at the commencement of trading of an options class, NOM will list a minimum of one options series in that class, rather than a minimum of three series for each expiration month in the class, as originally proposed.

[263] 15 U.S.C. 78k(a)(1).

[264] 17 CFR 240.11a2–2(T).

[265] The member may, however, participate in clearing and settling the transaction.

[266] *See* letter from Jeffrey S. Davis, Vice President and Deputy General Counsel, Nasdaq, to Nancy M. Morris, Secretary, Commission, dated December 13, 2007 (''Nasdaq 11(a) Letter'').

[267] *See, e.g.*, Registration Approval Order, *supra* note 19; BOX Approval Order, *supra* note 72; and Securities Exchange Act Release Nos. 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (order approving the Archipelago Exchange as an electronic trading facility of the Pacific Exchange (''PCX'')); 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991) (regarding NYSE's Off-Hours Trading Facility); 15533 (January 29, 1979), 44 FR 6084 (January 31, 1979) (regarding the American Stock Exchange (''Amex'') Post Execution Reporting System, the Amex Switching System, the Intermarket Trading System, the Multiple Dealer Trading Facility of the Cincinnati Stock Exchange, the PCX Communications and Execution System, and the Philadelphia Stock Exchange's Automated Communications and Execution System (''1979 Release'')); and 14563 (March 14, 1978) 43 FR 11542 (March 17, 1978) (regarding the NYSE's Designated Order Turnaround System (''1978 Release'')).

believes that the NOM System satisfies the off-floor transmission requirement.

Second, the Rule requires that the member not participate in the execution of its order. Nasdaq represented that at no time following the submission of an order is a Participant able to acquire control or influence over the result or timing of an order's execution. According to Nasdaq, the execution of a member's order is determined solely by what other orders, bids, or offers are present in the NOM System at the time the Participant submits the order and on the priority of those orders, bids, and offers.[268] Accordingly, the Commission believes that a Participant does not participate in the execution of an order submitted to the NOM System.

Third, Rule 11a2–2(T) requires that the order be executed by an exchange member who is unaffiliated with the member initiating the order. The Commission has stated that this requirement is satisfied when automated exchange facilities, such as the NOM System, are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange.[269] Nasdaq has represented that the design of the NOM System ensures that no member has any special or unique trading advantage in the handling of its orders after transmitting its orders to the Exchange.[270] Based on Nasdaq's representation, the Commission believes that the NOM System satisfies this requirement.

Fourth, in the case of a transaction effected for an account with respect to which the initiating member or an associated person thereof exercises investment discretion, neither the initiating member nor any associated person thereof may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account has expressly provided otherwise by written contract referring to Section 11(a) of the Act and Rule 11a2–2(T).[271] Nasdaq represents that Participants trading for covered accounts over which they exercise investment discretion must comply with this condition in order to rely on the rule's exemption.[272]

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether Amendment No. 2 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2007–004 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2007–004. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2007–004 and should be submitted on or before April 8, 2008.

IV. Exemption From Section 19(b) of the Act With Regard to CBOE, NYSE, and FINRA Rules Incorporated by Reference

Nasdaq proposes to incorporate by reference as NOM Rules certain rules of the CBOE, NYSE, and FINRA.[273] Thus, for certain NOM rules, NOM members will comply with a NOM rule by complying with the CBOE, NYSE, or FINRA rule referenced. In connection with its proposal to incorporate CBOE, NYSE, and FINRA rules by reference, Nasdaq requested, pursuant to Rule

[268] *See* Nasdaq 11(a) Letter, *supra* note 266, at 7. The Participant may cancel or modify the order, or modify the instruction for executing the order, but only from off the floor. The Commission has stated that the non-participation requirement is satisfied under such circumstances so long as such modifications or cancellations are also transmitted from off the floor. *See* 1978 Release, *supra* note 267 (stating that the ''non-participation requirement does not prevent initiating members from canceling or modifying orders (or the instructions pursuant to which the initiating member wishes orders to be executed) after the orders have been transmitted to the executing member, provided that any such instructions are also transmitted from off the floor'').

[269] In considering the operation of automated execution systems operated by an exchange, the Commission noted that while there is not an independent executing exchange member, the execution of an order is automatic once it has been transmitted into the systems. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2–2(T). *See* 1979 Release, *supra* note 267.

[270] *See* Nasdaq 11(a) Letter, *supra* note 266, at 8.

[271] 17 CFR 240.11a2–2(T)(a)(2)(iv). In addition, Rule 11a2–2(T)(d) requires a member or associated person authorized by written contract to retain compensation, in connection with effecting transactions for covered accounts over which such member or associated persons thereof exercises investment discretion, to furnish at least annually to the person authorized to transact business for the account a statement setting forth the total amount of compensation retained by the member in connection with effecting transactions for the account during the period covered by the statement. *See* 17 CFR 240.11a2–2(T)(d). *See also* 1978 Release, *supra* note 267 (stating ''[t]he contractual and disclosure requirements are designed to assure that accounts electing to permit transaction-related compensation do so only after deciding that such arrangements are suitable to their interests'').

[272] *See* Nasdaq 11(a) Letter, *supra* note 266, at 8.

[273] Specifically, Nasdaq proposes to incorporate by reference: (1) CBOE rules governing position and exercise limits for equity and index options, which are cross-referenced in Chapter III, Sections 7 and 9 of the NOM Rules and Chapter XIV, Sections 5 and 7 of the NOM Rules, respectively; (2) the margin rules of the CBOE or the NYSE, which are referenced in Chapter XIII, Section 3 of the NOM Rules; and (3) FINRA's rules governing communications with the public, which are referenced in Chapter XI, Section 22 of the NOM Rules. With respect to position limits, one commenter believes that each options exchange should be required to develop its own expertise and establish specific requirements in its own rules to provide for proper disclosure to members and to further the exchange's compliance and surveillance functions. *See* Amex Letter, *supra* note 4, at 4. Nasdaq believes that its reliance on the position and exercise limit rules of CBOE assures equal regulation among markets. *See* Nasdaq Response, *supra* note 5, at 2. The Commission does not believe that requiring each options exchange to develop its own position limits would promote the efficient use of SRO and Commission resources. In addition, as discussed below, Nasdaq will notify Participants whenever the CBOE proposes to change a position limit rule that has been incorporated by reference into the NOM Rules.

240.0–12,[274] an exemption under Section 36 of the Act from the rule filing requirements of Section 19(b) of the Act for changes to those NOM rules that are effected solely by virtue of a change to a cross-referenced CBOE, NYSE, or FINRA rule.[275] Nasdaq proposes to incorporate by reference categories of rules (rather than individual rules within a category) that are not trading rules. Nasdaq agrees to provide written notice to Participants prior to the launch of NOM of the specific CBOE, NYSE, and FINFRA rules that it will incorporate by reference.[276] In addition, Nasdaq will notify Participants whenever CBOE, NYSE, or FINRA proposes a change to a cross-referenced CBOE, NYSE, or FINRA rule.[277]

Using its authority under Section 36 of the Act, the Commission previously exempted certain SROs from the requirement to file proposed rule changes under Section 19(b) of the Act.[278] Each such exempt SRO agreed to be governed by the incorporated rules, as amended from time to time, but is not required to file a separate proposed rule change with the Commission each time the SRO whose rules are incorporated by reference seeks to modify its rules.

In addition, each SRO incorporated by reference only regulatory rules (*e.g.*, margin, suitability, arbitration), not trading rules, and incorporated by reference whole categories of rules (*i.e.*, did not ''cherry-pick'' certain individual rules within a category). Each exempt SRO had reasonable procedures in place to provide written notice to its members each time a change is proposed to the incorporated rules of another SRO in order to provide its members with notice of a proposed rule change that affects their interests, so that they would have an opportunity to comment on it.

The Commission is granting Nasdaq's request for exemption, pursuant to Section 36 of the Act, from the rule filing requirements of Section 19(b) of the Act with respect to the rules that Nasdaq proposes to incorporate by reference into NOM's Rules.[279] This exemption is conditioned upon Nasdaq providing written notice to NOM participants whenever the CBOE, NYSE, or FINRA proposes to change a rule that NOM has incorporated by reference. The Commission believes that this exemption is appropriate in the public interest and consistent with the protection of investors because it will promote more efficient use of Commission and SRO resources by avoiding duplicative rule filings based on simultaneous changes to identical rule text sought by more than one SRO. Consequently, the Commission grants Nasdaq's exemption request for NOM.

V. Exemption From the Requirement To Register as a SIP

As described above, NOM LLC will be delegated the authority to act as a SIP for quotations and transaction information related to securities traded on NOM and any trading facilities operated by NOM LLC. In a letter dated December 13, 2007 (''Request Letter'')[280] submitted in conjunction with Nasdaq's proposal, Nasdaq, on behalf of NOM LLC, requested that the Commission grant NOM LLC a permanent exemption from the requirement under Section 11A(b) of the Act and Rule 609 thereunder that a securities information processor acting as an exclusive processor register with the Commission.[281] For the reasons discussed below, the Commission grants the requested exemption, subject to the conditions specified in this order.

A. Overview

Pursuant to Nasdaq's proposal being approved today, NOM LLC will be a wholly owned subsidiary, established for the purpose of operating a Nasdaq facility for the trading of options. Nasdaq will delegate the performance of certain of its market functions to NOM LLC with respect to the quoting and trading of options, including the authority to act as a securities information processor for quoting and trading information related to options traded on NOM and any trading facilities operated by NOM LLC. Because NOM LLC will be engaging, on an exclusive basis on behalf of Nasdaq, in collecting, processing, or preparing for distribution or publication information with respect to transactions or quotations on, or effected or made by means of, a facility of Nasdaq, it will be an exclusive processor required to register pursuant to Section 11A(b) of the Act. Nevertheless, as further described in the Request Letter, Nasdaq and NOM LLC believe that the purposes of Section 11A(b) of the Act are not served by requiring NOM LLC to register as an exclusive processor under Section 11A(b) of the Act because Section 11A(b) subjects registered securities information processor to a regulatory regime to which NOM will be subject in all material respects as a facility of a registered national securities exchange.

B. Discussion

Sections 11A(b)(1) and (2) of the Act and Rule 609 thereunder (formerly Rule 11Ab2–1) provide that a securities information processor[282] that is acting as an exclusive processor[283] register with the Commission by filing an application for registration on Form SIP. Section 11A(b)(1) of the Act and Rule 609(c) thereunder allow the Commission, by rule or order, to conditionally or unconditionally exempt any securities information processor from any provision of Section 11A(b) of the Act or the rules or regulations thereunder, if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of Section 11A(b).[284]

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[274] 17 CFR 240.0–12.

[275] *See* letter from Jeffrey S. Davis, Vice President and Deputy General Counsel, Nasdaq, to Nancy Morris, Secretary, Commission, dated December 13, 2007 (''Nasdaq 19(b) Exemption Letter'').

[276] *See* Nasdaq 19(b) Exemption Letter, *supra* note 275, at 2.

[277] NOM will provide such notice through a posting on the same web site location where NOM will post its own rule filings pursuant to Rule 19b–4(l) under Act, within the time frame required by that Rule. The web site posting will include a link to the location on the CBOE, NYSE, or FINRA web site where those SROs' proposed rule changes are posted. *See* Nasdaq 19(b) Exemption Letter, *supra* note 275, at note 4 and accompanying text.

[278] *See* Securities Exchange Act Release No. 49260 (February 17, 2004), 69 FR 8500 (February 24, 2004). *See also* Registration Approval Order, *supra* note 19.

[279] As discussed above, Nasdaq has represented that it will notify Participants whenever the CBOE, NYSE, or FINRA proposes a change to a cross-referenced CBOE, NYSE, or FINRA rule. *See supra* note 277 and accompanying text.

[280] *See* letter from Edward S. Knight, Executive Vice President and General Counsel, Nasdaq, to Dr. Erik Sirri, Director, Division of Trading and Markets, Commission, dated December 13, 2007.

[281] 15 U.S.C. 78k–1(b). Rule 609 under the Act, 17 CFR 242.609, requires that the registration of a securities information processor be on Form SIP, 17 CFR 249.1001.

[282] Section 3(a)(22) of the Act, 15 U.S.C. 78c(a)(22)(A), defines the term securities information processor to mean any person engaged in the business of (i) collecting, processing, or preparing for distribution or publication, or assisting, participating in, or coordinating the distribution or publication of, information with respect to transactions in or quotations for any security (other than an exempted security) or (ii) distributing or publishing (whether by means of a ticker tape, a communications network, a terminal display device, or otherwise) on a current and continuing basis, information with respect to such transactions or quotations.

[283] Under Section 3(a)(22)(B) of the Act, 15 U.S.C. 78c(a)(22)(B), an exclusive processor is defined as any securities information processor or self-regulatory organization which, directly or indirectly, engages on an exclusive basis on behalf of any national securities exchange or registered securities association, or any national securities exchange or registered securities association which engages on an exclusive basis on its own behalf, in collecting, processing, or preparing for distribution or publication any information with respect to (i) transactions or quotations on or effected or made by means of any facility of such exchange or (ii) quotations distributed or published by means of any electronic system operated or controlled by such association.

[284] *See* 15 U.S.C. 78k–1(b)(1) and 17 CFR 242.609(c).

In its release adopting Rule 609, the Commission provides a framework for the consideration of exemption requests pursuant to Section 11A(b)(1) of the Act.[285] Specifically, the Commission indicates that the need for registration of an exclusive processor should be considered in respect of Sections 11A(b)(1), (b)(3) and (b)(5) and Sections 17(a) and (b) of the Act, insofar as they provide a framework for the surveillance and regulation of registered securities information processors. The Commission stated that any application for an exemption from registration should show not only how such exemption would be consistent with the statutory purposes discussed in the release, but also should demonstrate why, by virtue of the applicant's organization, operation or other characteristics, the applicant should be exempted from registration, the requirements of Section 11A(b) and the Commission's authority under Sections 17(a) and 17(b) of the Act.[286]

The Commission believes that NOM LLC will be acting as an exclusive processor as defined in Section 3(a)(22)(B) of the Act because it will engage on an exclusive basis on behalf of Nasdaq, in collecting, processing, or preparing for distribution or publication information with respect to transactions or quotations on, or effected or made by means of, a facility of Nasdaq. Further, NOM LLC, in carrying out market functions of Nasdaq, will operate (and will be regulated) as a facility of Nasdaq, which is a national securities exchange registered under Section 6 of the Act and the rules and regulations thereunder.[287] In the Request Letter, Nasdaq represents that NOM LLC will not perform any exclusive processor functions other than in its capacity as a facility for Nasdaq.[288]

As discussed below, with respect to its operation as a facility of a registered national securities exchange, NOM LLC already will be subject to regulation and Commission oversight under the Act as a facility of a registered exchange.[289] Oversight and regulation of registered exchanges encompass and exceed the oversight and regulation to which NOM LLC will be subject pursuant to registration under Section 11A(b)(1) of the Act and the rules and regulations thereunder. Accordingly, the Commission believes that registration of NOM LLC as an exclusive processor under Section 11A(b)(1) of the Act with respect to those functions that it will carry out as a facility of Nasdaq would not further the purposes of the Act.

1. Denial of Access to Services Provided by a Securities Information Processor or a National Securities Exchange

Section 11A(b)(5)(A) of the Act (1) requires a registered securities information processor to promptly file notice with the Commission if the processor prohibits or limits any person in respect of access to services offered, directly or indirectly, by the processor, and (2) provides that any such prohibition or limitation will be subject to Commission review, on its own motion or upon application by any person aggrieved.[290] If the prohibition or limitation is reviewed, the Commission shall dismiss the proceeding if it finds (after notice and opportunity of a hearing) that such prohibition or limitation is consistent with the provisions of the Act and the rules and regulations thereunder and that such person has not been discriminated against unfairly. If the Commission does not make such a finding, or if it finds that such prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, the Commission shall set aside the prohibition or limitation and require the securities information processor to permit such person access to services offered by the processor.[291]

NOM LLC, however, will be subject to similar Commission regulation and oversight pursuant to Sections 6(b)(7), 6(d), 19(d), and 19(f) of the Act with respect to its activities as a facility of Nasdaq.[292] Section 19(d)(1) requires, in part, that an exchange promptly file notice with the Commission if the exchange prohibits or limits any person in respect to access to services offered by such exchange or member thereof.[293] Any such action for which the exchange must file notice is subject to Commission review.[294]

Section 19(f) of the Act, among other things, allows the Commission to set aside an SRO's prohibition or limitation with respect to access to services offered by the SRO if the Commission finds that the prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Section 6(b)(7) of the Act provides that the rules of an exchange, among other things, must provide a fair procedure for the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange or a member thereof.[295]

Section 6(d) of the Act requires, among other things, that a national securities exchange that initiates a proceeding to determine whether to prohibit or limit a person's access to services offered by the exchange notify the person of the specific grounds for the prohibition or limitation and provide an opportunity to be heard. In addition, Section 6(d) provides that an exchange's determination to prohibit or limit a person's access to the exchange's services must be supported by a statement setting for the specific grounds on which the prohibition or limitation is based.

The Commission therefore believes that regulation of Nasdaq as a national securities exchange provides for equivalent regulation and Commission oversight of actions that NOM LLC may take in its capacity as a facility to deny access to services as would be the case were it to register as an exclusive processor under Section 11A(b) of the Act.

2. Limitation on Activities of a Securities Information Processor or a National Securities Exchange

Section 11A(b)(6) of the Act grants the Commission authority to censure or place limitations on the activities, functions, or operations of any registered securities information processor or suspend for a period not exceeding twelve months or revoke the registration of any such processor.[296] Likewise, Section 19(h)(1) of the Act grants the Commission authority to

[285] *See* Securities Exchange Act Release No. 11673 (September 23, 1975), 40 FR 45422 (October 2, 1975) (adopting Commission Rule 11Ab2–1, which has been redesignated as Rule 609).

[286] *Id.* at 45423.

[287] Section 3(a)(2) of the Act, 15 U.S.C. 78c(a)(2), defines the term facility, with respect to an exchange, to include its premises, tangible or intangible property whether on the premises or not, any right to use such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.

[288] Request Letter, *supra* note 280, at 3.

[289] The definition of an exchange under the Act includes ''the market facilities maintained by such exchange.'' *See* Section 3(a)(1) of the Act, 15 U.S.C. 78c(a)(1). The functions and operation of a national securities exchange encompass the collection, processing, and dissemination of information related to securities trading.

[290] *See* 15 U.S.C. 78k–1(b)(5)(A).

[291] *See* Section 11A(b)(5)(B) under the Act, 15 U.S.C. 78k–1(b)(5)(B).

[292] 15 U.S.C. 78f(b)(7) and (d) and 78s(d) and (f).

[293] 15 U.S.C. 78s(d)(1).

[294] 15 U.S.C. 78s(d)(2). *See also* Section 19(f) of the Act, 15 U.S.C. 78s(f).

[295] 15 U.S.C. 78f(b)(7). Section 6(d)(2), 15 U.S.C. 78f(d)(2), provides procedural requirements for any such proceeding by an exchange.

[296] 15 U.S.C. 78k–1(b)(6).

suspend for a period not exceeding twelve months or revoke the registration of an exchange, or to censure or impose limitations upon the activities, functions, and operations of an exchange.[297] The Commission therefore has the authority to place limitations on the activities of NOM LLC as a facility of a registered national securities exchange.

3. Access to Books and Records of a Securities Information Processor or a National Securities Exchange

Section 17(a)(1) of the Act requires that national securities exchanges and registered securities information processors make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[298] Section 17(b) of the Act requires that such records be subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission and the appropriate regulatory agency for such persons.[299]

The record retention and production requirements set out in Sections 17(a) and (b) of the Act therefore will be applicable to NOM LLC with respect to its activities as a facility of Nasdaq. Thus, requiring NOM LLC to register as an exclusive processor with respect to its activities as a facility of a registered exchange would serve no additional regulatory purpose in this instance.

C. Conclusion

On the basis of the foregoing, the Commission finds that, with respect to its activities as a facility of Nasdaq, granting an exemption to NOM LLC from the requirement to register as a securities information processor pursuant to Section 11A(b) of the Act is consistent with the public interest, the protection of investors, and the purposes of Section 11A(b) of the Act, including maintenance of fair and orderly markets in securities and the removal of impediments to, and perfection of the mechanism of, a national market system. This exemption is limited only to the exclusive processor activities that NOM LLC performs as a facility of Nasdaq.

VI. Accelerated Approval of the Trading Rules Proposal, as Amended

The Commission finds good cause for approving the Trading Rules Proposal, as amended, prior to the thirtieth day after the date of publication of notice of filing of the amended proposal in the **Federal Register**.

As discussed above, the Commission believes that the changes proposed in Amendment No. 2 strengthen and clarify the Trading Rules Proposal. In addition to making non-substantive and technical changes, Amendment No. 2 incorporates changes designed to make NOM's rules consistent with or substantially similar to rules adopted by the other options exchanges or the provisions of the Linkage Plan.[300] Other changes in Amendment No. 2 are designed to clarify NOM's rules,[301] provide additional protections,[302] address non-substantive issues or address concerns raised by commenters.[303] For these reasons, the Commission finds good cause for approving the Trading Rules Proposal, as amended, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.

VII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[304] that the Trading Rules Proposal (SR–NASDAQ–2007–004), as amended, be, and hereby is, approved on an accelerated basis, except for the $1 Strike Price Program, which is approved on a pilot basis through June 5, 2008; and that the Corporate Structure Proposal (SR–

[297] 15 U.S.C. 78s(h)(1). *See also* Sections 19(h)(2), (h)(3), and (h)(4) of the Act, 15 U.S.C. 78s(h)(2), (h)(3), and (h)(4).

[298] 15 U.S.C. 78q(a). The Commission has promulgated rules pursuant to Section 17(a) of the Act that apply to national securities exchanges, but not registered securities information processors. *See, e.g.*, Rule 17a–1 under the Act, 17 CFR 240.17a–1 (requiring in part a national securities exchange to preserve, for a period of not less than five years, the first two in an easily accessible place, at least one copy of all documents that are made or received by it in the course of its business as such and in the conduct of its self-regulatory activity, and to furnish copies of such records to any representative of the Commission upon request). Form SIP, the application for registration of a securities information processor, does require that a securities information processor provide the Commission with certain information relating to its business organization, financial information, operational capability, and access to services. 17 CFR 249.1001.

[299] 15 U.S.C. 78q(b).

[300] *See, e.g.*, the addition of rules in Chapter II providing for registration as a Limited Principal and as a Limited Representative in options and security futures; changes in Chapter IV, Section 3, to allow NOM to list an option that does not meet its initial listing standards if the option is listed on another national securities exchange and meets certain other conditions (*see supra* notes 220 to 221 and accompanying text); changes to Chapter IV, Commentaries .02 and .03, relating to the $1 Strike Price Program and the $2.50 Strike Price Program, respectively (*see supra* notes 208 to 213 and accompanying text); changes to the obvious error provisions of Chapter V, Section 6 (*see supra* note 168 and accompanying text); and changes to various provisions of the Intermarket Linkage Rules in Chapter XII to require a response time of five seconds rather than three seconds.

[301] *See, e.g.*, revisions to Nasdaq IM–9216 to include Chapter X, Section 7 of the NOM Rules in Nasdaq's MRVP (*see supra* notes 243 to 249 and accompanying text); changes to Chapter I, Section 1 to clarify the definition of ''primary market;'' changes to Chapter III, Section 15 to clarify that the provisions of the rule apply only to options clearing Participants; changes to Chapter VI, Section 10 to more clearly articulate NOM's price/time execution algorithm; the deletion of a proposed provision in Chapter VII relating to short sales by options market makers; and changes to Chapter VIII, Sections 1(b) and 1(d) to require Participants to submit contrary exercise advices to the Options Clearing Corporation rather than to NOM.

[302] *See, e.g.*, changes to Chapter III, Section 4(f) to prohibit a Participant with knowledge of an order being facilitated or submitted to NOM for price improvement (*e.g.*, price improving orders) from entering an order to buy or sell the underlying security, as provided in the rule; a modification to the position and exercise limits in Chapter III, Sections 7 and 9 to clarify that the incorporation of CBOE rules applies to the trading of options listed on both CBOE and Nasdaq; modifications to the Closing Cross procedures in Chapter VI, Section 9 that, among other things, provide that the Current Reference Price and the Near Clearing Price will be disseminated in an option's minimum price variation and never at a price that would expose undisplayed interest on the NOM book (*see supra* notes 162 to 164 and accompanying text); additions to Chapter VI, Section 11 relating to NOS as a facility of Nasdaq, which, among other things, require that an SRO other than Nasdaq be the designated examining authority for NOS, and that NOM establish procedures and controls designed to restrict the flow of confidential and proprietary information between Nasdaq and its facilities, including NOS (*see supra* notes 187 to 191 and accompanying text); the addition to Chapter VI, Section 11 of a requirement that Participants whose orders are routed to away markets honor such trades to the same extent that they would be obligated to honor a trade executed on NOM; a change to Chapter XI, Section 21 to state that a Participant must expedite the transfer of a customer's account pursuant to Nasdaq Rules IM–2110–7 and 11870; changes to Chapter XIV to add position limit provisions for Micro-Narrow Based Index options and to refer to the applicable NOM rules for position limits on broad-based index options traded on NOM but not on the CBOE.

[303] *See, e.g.*, the proposed change to eliminate Non-Displayed Orders (*see supra* notes 100 to 102 and accompanying text); the revised definition of ''index option'' (*see supra* note 219); the changes in Chapter IV, Section 5 to clarify NOM's procedures and status with respect to the Linkage Plan when an options class that has been approved for listing on NOM has no series open for trading, and when the sole Market Maker in a series withdraws its registration (*see supra* notes 78 to 79 and accompanying text); the changes in Chapter VI to clarify the definitions and order routing procedures for ''System Securities'' and ''Non-System Securities'' (*see supra* notes 183 to 186 and accompanying text); the clarification in Chapter VI, Section 9 of the time of the Closing Cross for options on fund shares and broad-based indexes (*see supra* notes 147 to 149 and accompanying text); the change in Chapter VI, Section 10, to identify the taker of liquidity as the party that removes liquidity previously posted to the Book; and the change in Chapter VII, Section 12, Commentary .04 to indicate that a Participant may not inform another Participant or other third party of any of the terms of an order after submitting the order to NOM.

[304] 15 U.S.C. 78s(b)(2).

NASDAQ–2007–080) be, and hereby is, approved.

Although the Commission's approval of the Trading Rules Proposal, as amended, and the Corporate Structure Proposal is final and the proposed rules are therefore effective,[305] it is further ordered that the operation of NOM is conditioned on the satisfaction of the requirements below:

A. *Participation in National Market System Plans Relating to Options Trading.* Nasdaq must join the Options Price Reporting Authority; the OLPP; the Linkage Plan; and the National Market System Plan of the Options Regulatory Surveillance Authority.

B. *Examination by the Commission.* Nasdaq must have, and represent in a letter to the staff in the Commission's Office of Compliance Inspections and Examinations (''OCIE'') that it has, adequate surveillance procedures and programs in place to effectively regulate NOM.

C. *Delegation Agreement.* Nasdaq and NOM LLC must enter into the Delegation Agreement as described above.[306]

It is further ordered, pursuant to Section 11A(b) of the Act,[307] that NOM LLC shall be exempt from registering as a securities information processor, subject to the conditions specified in this order.

It is further ordered, pursuant to Section 36 of the Act,[308] that Nasdaq shall be exempt from the rule filing requirements of Section 19(b) of the Act [309] with respect to the rules that Nasdaq proposes to incorporate by reference into NOM's Rules, subject to the conditions specified in this order.

By the Commission.

Nancy M. Morris,

Secretary.

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[305] As noted above, the $1 Strike Price Program, which is part of the Trading Rules Proposal, is approved on a pilot basis through June 5, 2008.

[306] *See supra* note 15 and accompanying text.

[307] 15 U.S.C. 78k–1(b).

[308] 15 U.S.C. 78mm.

[309] 15 U.S.C. 78s(b).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57469; File No. SR–NYSEArca–2008–08)]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change Pertaining to the Imposition of Fines for Minor Rule Violations

March 11, 2008.

On January 18, 2008, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Arca Rule 6.24, ''Exercise of Options Contracts,'' and NYSE Arca Rule 10.12 ''Minor Rule Plan.'' The proposed rule change was published for comment in the **Federal Register** on February 5, 2008.[3] The Commission received no comments regarding the proposal. This order approves the proposed rule change.

NYSE Arca Rule 6.24 contains special procedures that apply to the exercise of options on the last business day before expiration. The Exchange proposes to amend NYSE Arca Rule 6.24 to: (i) Add a reference to new terminology; (ii) make minor revisions to the procedures related to exercising option contracts; (iii) amend Commentary .08 of NYSE Arca Rule 6.24 to authorize the Exchange to sanction an OTP Holder or OTP Firm that fails to follow NYSE Arca Rule 6.24, pursuant to the Minor Rule Plan (''MRP''); and (iv) add the recommended sanctions to the MRP contained in NYSE Arca Rule 10.12.

An option holder desiring to exercise or not exercise expiring options must either: (i) take no action and allow exercise determinations to be made in accordance with the Options Clearing Corporation's (''OCC'') Ex-by-Ex procedures, where applicable; or (ii) submit a Contrary Exercise Advice (''CEA'') to the Exchange.[4] A CEA is also referred to within the options industry as an Expiring Exercise Declaration (''EED''). While the form itself may be called by a different name, the purpose and procedure for submitting an EED is identical to that of a CEA. Therefore, the Exchange proposes adding a parenthetical reference to EEDs within NYSE Arca Rule 6.24.

An OTP Holder or OTP Firm that manually submits a CEA to the Exchange does so by completing a form and putting it in the Exchange's Contrary Exercise Advice Box. Going forward, the Exchange will discontinue the use of the Contrary Exercise Advice Box; and instead, an OTP Holder or OTP Firm will submit a CEA directly to a designated representative of the Exchange's Options Surveillance Department.

Commentary .08 to NYSE Arca Rule 6.24 provides that the failure of any OTP Holder to follow the provisions contained in this rule may be referred to the Ethics and Business Conduct Committee (''EBCC'') and result in the assessment of a fine, which may include, but is not limited to, the disgorgement of potential economic gain obtained or loss avoided by the subject exercise. Referral to the EBCC involves a formal disciplinary proceeding. NYSE Arca proposes to add a provision to Commentary .08 that would authorize the Exchange to sanction an OTP Holder or OTP Firm that fails to follow NYSE Arca Rule 6.24, pursuant to the MRP. The Exchange would retain the authority to refer violators to the EBCC for formal disciplinary proceedings.

The Exchange also proposes adding the phrase ''or OTP Firm'' to Commentary .08 to NYSE Arca Rule 6.24. The Exchange has always intended to apply NYSE Arca Rule 6.24 equally to both OTP Holders and OTP Firms. The addition of OTP Firms will codify the original intent of the NYSE Arca Rule 6.24.

Under this proposal, violators of the NYSE Arca Rule 6.24 may be subject to MRP fines based on the number of violations occurring within a rolling 24-month period. An individual OTP Holder would be subject to a fine of $500 for the first offense, $1,000 for the second offense, and $2,500 for the third offense. An OTP Firm would be subject to a $1,000 fine for the first offense, $2,500 for the second offense, and $5,000 for a third offense.[5] A list of the proposed fines would be added to the MRP fine schedule in NYSE Arca Rule 10.12. The addition of a sanction under the MRP adds an additional method for disciplining violators of NYSE Arca Rule 6.24.[6] The Exchange submits that

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57220 (January 29, 2008), 73 FR 6757.

[4] A CEA is a communication to either: (i) Not exercise an option that would be automatically exercised under OCC's Ex-by-Ex procedure, or (ii) exercise an option that would not be automatically exercised under OCC's Ex-by-Ex procedure.

[5] The Exchange, in its discretion, processes subsequent violations, after the third violation, according to NYSE Arca Rule 10.4. *See* NYSE Arca Rule 10.12(h), n.1.

[6] In addition, as a member of the Intermarket Surveillance Group, the Exchange, as well as certain other self-regulatory organizations (''SROs'')

Continued

it will continue to conduct surveillance with due diligence and make its determination, on a case by case basis, whether a fine under the MRP is appropriate, or whether a violation should be subject to formal disciplinary proceedings.

Finally, the Exchange proposes to use NYSE Arca Rule 10.12(h)(33) and Rule 10.12(k)(i)(33), which are presently designated as ''Reserved,'' for new NYSE Arca Rule 10.12(h)(33), which would reference CEA/EED violations pursuant to Rule 6.24, and new NYSE Arca Rule 10.12(k)(i)(33), which would include the recommended fines for CEA/EED violations.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[7] In particular, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,[8] which requires that the rules of an exchange be designed to promote just and equitable principles of trade, to facilitate transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission further believes that NYSE Arca's proposal to sanction individuals and member organizations who fail to submit Advice Cancel or exercise instructions in a timely manner is consistent with Sections 6(b)(1) and 6(b)(6) of the Act,[9] which require that the rules of an exchange enforce compliance with, and provide appropriate discipline for, violations of Commission and Exchange rules. In addition, the Commission finds that the proposal is consistent with the public interest, the protection of investors, or otherwise in furtherance of the purposes of the Act, as required by Rule 19d–1(c)(2) under the Act,[10] which governs minor rule violation plans. The Commission believes that the proposed rule change should strengthen the Exchange's ability to carry out its oversight and enforcement responsibilities as an SRO in cases where full disciplinary proceedings are unsuitable in view of the minor nature of the particular violation.

In approving this proposed rule change, the Commission in no way minimizes the importance of compliance with NYSE Arca rules and all other rules subject to the imposition of fines under the MRVP. The Commission believes that the violation of any SRO rules, as well as Commission rules, is a serious matter. However, the MRVP provides a reasonable means of addressing rule violations that do not rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handling certain violations. The Commission expects that NYSE Arca would continue to conduct surveillance with due diligence and make a determination based on its findings, on a case-by-case basis, whether a fine of more or less than the recommended amount is appropriate for a violation under the NYSE Arca MRVP or whether a violation requires formal disciplinary action.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[11] and Rule 19d–1(c)(2) under the Act,[12] that the proposed rule change (SR–NYSEArca–2008–08) be, and hereby is, approved and declared effective.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–5352 Filed 3–17–08; 8:45 am]

BILLING CODE 8011–01–P

executed and filed on October 29, 2007 with the Commission, a final version of an Agreement pursuant to Section 17(d) of the Act (the ''17d–2 Agreement''). As set forth in the 17d–2 Agreement, the SROs have agreed that their respective rules concerning the filing of Expiring Exercise Declarations, also referred to as Contrary Exercise Advices, of options contracts, are common rules. As a result, the proposal to amend NYSE Arca's MRVP will result in further consistency in sanctions among the SROs that are signatories to the 17d–2 Agreement concerning Contrary Exercise Advice violations.

[7] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78f(b)(1) and 78f(b)(6).

[10] 17 CFR 240.19d–1(c)(2).

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 240.19d–1(c)(2).

[13] 17 CFR 200.30–3(a)(12); 17 CFR 200.30–3(a)(44).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57482; File No. SR–Phlx–2007–69]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, Relating to Obvious Errors

March 12, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 4, 2007, the Philadelphia Stock Exchange, Inc. filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. The Phlx filed Amendment No. 1 to the proposal on February 29, 2008. On March 11, 2008, the Phlx filed Amendment No. 2 to the proposal. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 1092, Obvious Errors, to: (i) Change the definition of Theoretical Price to mean either the last National Best Bid price with respect to an erroneous sell transaction or the last National Best Offer price with respect to an erroneous buy transaction, just prior to the trade; (ii) allow an Options Exchange Official [3] to establish the Theoretical Price when there are no quotes for comparison purposes, or when the National Best Bid/Offer (''NBBO'') for the affected series, just prior to the erroneous transaction, was at least two times the permitted bid/ask differential under Exchange Rule 1014(c)(1)(A)(i)(a); (iii) establish the Theoretical Price for transactions occurring as part of the Exchange's automated opening system as the first quote after the transaction(s) in question that does not reflect the erroneous transaction(s); (iv) determine the average quote width by adding the quote widths of sample quotations at regular 15-second intervals during the two minutes preceding and following an erroneous transaction; (v) delete the provision pertaining to trades that are automatically executed when the specialist or Registered Options Trader (''ROT'') sells $.10 or more below parity; (vi) permit nullification of transactions that occur during trading halts on the Exchange or in the underlying security in certain situations; and (vii) increase the time period within which a party to an erroneous transaction must notify Market Surveillance that they believe they are a party to a transaction resulting from an obvious error, and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Rule 1(pp).

establish a specific notification time period for the opening.

The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.phlx.com*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange states that the purpose of the proposed rule change is to enable Exchange members to better manage risk by amending the Exchange's Obvious Error rule to address situations that are not currently covered by the rule.

Definition of Theoretical Price

Currently, Rule 1092 defines the Theoretical Price of an option (for purposes of Rule 1092 only) as follows: (i) If the series is traded on at least one other options exchange, the mid-point of the NBBO just prior to the transaction; and (ii) if there are no quotes for comparison purposes, as determined by an Options Exchange Official and designated personnel in the Exchange's Market Surveillance Department.

The Exchange believes that in certain situations the application of the rule when determining to nullify or adjust transactions may lead to an unfair result for one of the parties to the transaction, particularly where the market for the affected series includes a bid price that is relatively small (for example, $0.50) and a substantially higher offer (for example $5.00). The result is that a transaction to sell that occurs correctly on the bid at $0.50 could be adjusted based on the midpoint of the NBBO, which is, in this example, $2.75. In such a case, the result is unfair to the bidder at $0.50, whose price would be adjusted based on the Theoretical Price of $2.75, and an unjust enrichment to the seller, who is entitled to $0.50 based on the bid, but who would receive the adjusted price of over $2.00 higher because of the rule, and not due to market conditions.

Accordingly, the proposal would re-define ''Theoretical Price'' to mean either the last National Best Bid price with respect to an erroneous sell transaction or the last National Best Offer price with respect to an erroneous buy transaction, just prior to the trade. The purpose of this provision is to establish a Theoretical Price that is clearly defined when there are quotations to compare to the erroneous transaction price, and to eliminate the scenario above that arises from the ''mid-point'' test when the NBBO is particularly wide.

The proposal also would permit an Options Exchange Official to establish the Theoretical Price when there are no quotes available for comparison purposes, or when the bid/ask differential of the NBBO for the affected series, just prior to the erroneous transaction, was at least two times the permitted bid/ask differential under Rule 1014(c)(1)(A)(i)(a).[4] In each such circumstance, the Theoretical Price would be determined by an Options Exchange Official. In order to expedite the process, the current requirement for Market Surveillance input would be deleted.

The Exchange believes that the objective standard for the determination of a ''wide market'' based on existing permissible bid/ask differentials provides a sound guideline for Options Exchange Officials in determining Theoretical Price when there are no quotes for comparison purposes.

The proposed rule change also would state that for transactions occurring as part of the Exchange's automated opening system, the Theoretical Price would be the first quote after the transaction(s) in question that does not reflect the erroneous transaction(s).

[4] Phlx Rule 1014(c)(1)(A)(i)(a) permits a difference of no more than $.25 between the bid and the offer for each option contract for which the prevailing bid is less than $2; no more than $.40 where the prevailing bid is $2 or more but less than $5; no more than $.50 where the prevailing bid is $5 or more but less than $10; no more than $.80 where the prevailing bid is $10 or more but less than $20; and no more than $1 where the prevailing bid is $20 or more, provided that, in the case of equity options, the bid/ask differentials stated above shall not apply to in-the-money series where the market for the underlying security is wider than the differentials set forth above. For such series, the bid/ask differentials may be as wide as the quotation for the underlying security on the primary market, or its decimal equivalent rounded up to the nearest minimum increment. The Exchange may establish differences other than the above for one or more series or classes of options.

Erroneous Quote in Primary Underlying Market

Currently, in order for an options trade to be nullified or adjusted due to an erroneous quote in the primary market for the underlying security, Market Surveillance is required to conduct complex and cumbersome research involving the average quote width in the underlying quote during the two minutes preceding and following the transaction.

In order to streamline and expedite the process, the proposal would amend this provision such that Market Surveillance would not be required to review each quote during this time period. Instead, the average quote width would be determined by adding the quote widths of sample quotations at regular 15-second intervals during the four minute time period referenced above, and dividing by the number of quotation samples used.

Transactions During Trading Halts

The proposed rule change would permit nullification of transactions that occur during trading halts on the Exchange or in the primary market for the underlying security. Specifically, the Exchange proposes to adopt new Rule 1092(c)(iv), which would provide that trades would be nullified when: (i) The trade occurred during a trading halt in the affected option on the Exchange; (ii) respecting equity options (including options overlying ETFs), the trade occurred during a trading halt on the primary market for the underlying security; or (iii) respecting index options, the trade occurred during a trading halt on the primary market in underlying securities representing more than 10% of the current index value.

Notification Period

The proposal would increase the current time period within which a party to an erroneous transaction must notify Market Surveillance that they believe they are a party to a transaction resulting from an obvious error, and establish a specific time period applicable to openings.

Specifically, a specialist or ROT must notify Market Surveillance within fifteen minutes of the transaction (increased from the current five-minute window). A member or member organization that initiated the order from off the floor of the Exchange must notify Market Surveillance within twenty minutes of the execution (increased from the current fifteen-minute window).

Additionally, Rule 1092(e)(i) would be amended to afford a longer time

period during which non-broker-dealer customers may notify Market Surveillance that they believe they participated in a transaction that was the result of an Obvious Error. Respecting transactions that occur as part of the Exchange's automated opening process, after the proposed twenty-minute notification period and until 4:30 p.m. Eastern Time (''ET'') on the subject trade date, where parties to the transaction are a non-broker-dealer customer and an Exchange specialist, Streaming Quote Trader, (''SQT''),[5] Remote Streaming Quote Trader (''RSQT''),[6] or non-SQT ROT,[7] the non-broker-dealer customer may request review of the subject transaction, and the execution price of the transaction will be adjusted to the first quote after the transaction(s) in question that does not reflect the erroneous transaction(s) (provided the adjustment does not violate the customer's limit price) by an Options Exchange Official,[8] if there was an Obvious Error. The Exchange believes that this provision should address the situation on the opening where a large opening order might cause the Exchange's opening transaction to result from an Obvious Error, because the Exchange's opening price is defined as the price at which the greatest number of contracts will trade.[9]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] in particular, in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, by modernizing the Exchange's Obvious Error rule to address situations not covered in the current rule.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange did not solicit or receive any written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period: (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

A. By order approve the proposed rule change or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2007–69 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2007–69. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2007–69 and should be submitted on or before April 8, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

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[5] An SQT is an Exchange ROT who has received permission from the Exchange to generate and submit option quotations electronically through an electronic interface with AUTOM via an Exchange approved proprietary electronic quoting device in eligible options to which such SQT is assigned. *See* Exchange Rule 1014(b)(ii)(A).

[6] An RSQT is a participant in the Exchange's electronic trading system, ''Phlx XL'' who has received permission from the Exchange to trade in options for his own account, and to generate and submit option quotations electronically from off the floor of the Exchange through AUTOM in eligible options to which such RSQT has been assigned.

[7] Currently, there are a number of ROTs on the Exchange's options floor that do not stream electronic quotations into the Phlx XL system, known as ''non-SQT ROTs.'' A Non-SQT ROT is defined as an ROT who is neither an SQT nor an RSQT. *See* Exchange Rule 1014(b)(ii)(C).

[8] In order to correct an oversight, the Exchange is replacing the term ''Floor Official'' with ''Options Exchange Official,'' which should have been changed in a previous proposed rule change. *See* Securities Exchange Act Release No. 55877 (June 7, 2007), 72 FR 32937 (June 14, 2007) (SR–Phlx–2006–87).

[9] *See* Exchange Rule 1017(c).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

Order of Suspension of Trading

March 13, 2008.

In the Matter of Andros Isle Development Corporation; Asante Networks, Inc.; Beluga Composites Corporation; Cobra Energy Inc.; Complete Care Medical, Inc.; Disability Access Corporation; El Alacran Gold Mine Corp.; Extreme Fitness Inc.; Gaming Transactions Inc.; Global Equity Fund, Inc.; HealthSonix Inc.; IQ Webquest Inc.; JSX Energy Inc.; Kensington Industries, Inc.; Kingslake Energy Inc.; L International Computers Inc.; Let's Talk Recovery Inc.; Mobilestream Oil, Inc.; Mvive Inc.; Native American Energy Group Inc.; Paramount Gold and Silver Corp.; Regal Technologies, Inc.; Remington Ventures, Inc.; Straight Up Brands Inc.; Transglobal Oil Corp.; Turquoise Development Company

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Andros Isle Development Corporation, which is quoted on the Pink Sheets under the ticker symbol AVPJ. Trading in the securities of Andros Isle Development Corporation appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Asante Networks, Inc., which is quoted on the Pink Sheets under the ticker symbol ASTN. Trading in the securities of Asante Networks, Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Beluga Composites Corporation, which is quoted on the Pink Sheets under the ticker symbol BGCC. Trading in the securities of Beluga Composites Corporation appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Cobra Energy Inc., which is quoted on the Pink Sheets under the ticker symbol CBNG. Trading in the securities of Cobra Energy Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Complete Care Medical, Inc., which is quoted on the Pink Sheets under the ticker symbol CCMI. Trading in the securities of Complete Care Medical, Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Disability Access Corporation, which is quoted on the Pink Sheets under the ticker symbol DBYC. Trading in the securities of Disability Access Corporation appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of El Alacran Gold Mine Corp., which is quoted on the Pink Sheets under the ticker symbol EAGM. Trading in the securities of El Alacran Gold Mine Corp. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Extreme Fitness Inc., which is quoted on the Pink Sheets under the ticker symbol EXTF. Trading in the securities of Extreme Fitness Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Gaming Transactions Inc., which is quoted on the Pink Sheets under the ticker symbol GGTS. Trading in the securities of Gaming Transactions Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or

agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Global Equity Fund, Inc., which is quoted on the Pink Sheets under the ticker symbol GEQF. Trading in the securities of Global Equity Fund, Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of HealthSonix Inc., which is quoted on the Pink Sheets under the ticker symbol HSXI. Trading in the securities of HealthSonix Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of IQ Webquest Inc., which is quoted on the Pink Sheets under the ticker symbol IQWB. Trading in the securities of IQ Webquest Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of JSX Energy Inc., which is quoted on the Pink Sheets under the ticker symbol JSXG. Trading in the securities of JSX Energy Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Kensington Industries, Inc., which is quoted on the Pink Sheets under the ticker symbol KSGT. Trading in the securities of Kensington Industries, Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Kingslake Energy Inc., which is quoted on the Pink Sheets under the ticker symbol KGLJ. Trading in the securities of Kingslake Energy Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of L International Computers Inc., which is quoted on the Pink Sheets under the ticker symbol LITL. Trading in the securities of L International Computers Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Let's Talk Recovery Inc., which is quoted on the Pink Sheets under the ticker symbol LKRV. Trading in the securities of Let's Talk Recovery Inc. appears to predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Mobilestream Oil, Inc., which is quoted on the Pink Sheets under the ticker symbol MSRM. Trading in the securities of Mobilestream Oil, Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Mvive Inc., which is quoted on the Pink Sheets under the ticker symbol MVIV. Trading in the securities of Mvive Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Native American Energy Group Inc., which is quoted on the Pink Sheets under the ticker symbol NVMG. Trading in the securities of Native American Energy

Group Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Paramount Gold and Silver Corp., which is quoted on the American Stock Exchange under the ticker symbol PZG. Trading in the securities of Paramount Gold and Silver Corp. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Regal Technologies, Inc., which trades in the grey market under the ticker symbol RGTN. Trading in the securities of Regal Technologies, Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Remington Ventures, Inc., which is quoted on the Pink Sheets under the ticker symbol REMV. Trading in the securities of Remington Ventures, Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Straight Up Brands Inc., which is quoted on the Pink Sheets under the ticker symbol STRU. Trading in the securities of Straight Up Brands Inc. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Transglobal Oil Corp., which is quoted on the Pink Sheets under the ticker symbol TRGO. Trading in the securities of Transglobal Oil Corp. appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Turquoise Development Company, which is quoted on the Pink Sheets under the ticker symbol TQDC. Trading in the securities of Turquoise Development Company appears to be predicated on apparent misstatements. Certain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed companies is suspended for the period from 9:30 a.m. EST on March 13, 2008, through 11:59 p.m. EST on March 27, 2008.

By the Commission.

Nancy M. Morris,

Secretary.

[FR Doc. 08–1039 Filed 3–13–08; 12:34 pm]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 11188]

Massachusetts Disaster # MA–00014 Declaration of Economic Injury

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Economic Injury Disaster Loan (EIDL) declaration for the Commonwealth of Massachusetts, dated 03/10/2008.

Incident: Fire.

Incident Period: 01/05/2008.

Effective Date: 03/10/2008.

EIDL Loan Application Deadline Date: 12/10/2008.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's EIDL declaration, applications for economic injury disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Suffolk.

Contiguous Counties: Massachusetts, Essex, Middlesex, Norfolk.

The Interest Rate is: 4.000.

The number assigned to this disaster for economic injury is 111880.

The State which received an EIDL Declaration # is Massachusetts.

(Catalog of Federal Domestic Assistance Number 59002)

March 10, 2008.

Steven C. Preston,

Administrator.

[FR Doc. E8–5387 Filed 3–17–08; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 11191 and # 11192]

Florida Disaster # FL–00030

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of FLORIDA dated 03/10/2008.

Incident: Severe Storms and Flooding.

Incident Period: 02/21/2008 through 02/22/2008.

Effective Date: 03/10/2008.

Physical Loan Application Deadline Date: 05/09/2008.

Economic Injury (EIDL) Loan Application Deadline Date: 12/10/2008.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Bay

Contiguous Counties:

Florida, Calhoun, Gulf, Jackson, Walton, Washington.

The Interest Rates are:

	Percent
Homeowners With Credit Available Elsewhere	5.500
Homeowners Without Credit Available Elsewhere	2.750
Businesses With Credit Available Elsewhere	8.000
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	5.250
Businesses And Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 11191 6 and for economic injury is 11192 0.

The State which received an EIDL Declaration # is Florida.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

March 10, 2008.

Steven C. Preston,

Administrator.

[FR Doc. E8–5388 Filed 3–17–08; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 6136]

In the Matter of the Designation of al-Shabaab, aka al-Shabab, aka Shabaab, aka the Youth, aka Mujahidin Al-Shabaab Movement, aka Mujahideen Youth Movement, aka Mujahidin Youth Movement, aka MYM, aka Harakat Shabab al-Mujahidin, aka Hizbul Shabaab, aka Hisb'ul Shabaab, aka al-Shabaab al-Islamiya, aka Youth Wing, aka al-Shabaab al-Islaam, aka al-Shabaab al-Jihaad, aka the Unity of Islamic Youth, as a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act, as Amended

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the relevant circumstances described in section 219 of the Immigration and Nationality Act, as amended (hereinafter ''INA'') (8 U.S.C. 1189), exist with respect to al-Shabaab (aka al-Shabab, aka Shabaab, aka the Youth, aka Mujahidin al-Shabaab Movement, aka Mujahideen Youth Movement, aka Mujahidin Youth Movement, aka MYM, aka Harakat Shabab al-Mujahidin, aka Hizbul Shabaab, aka Hisb'ul Shabaab, aka al-Shabaab al-Islamiya, aka Youth Wing, aka al Shabaab al-Islaam, aka al-Shabaab al-Jihaad, aka the Unity of Islamic Youth).

Therefore, I hereby designate that organization and its aliases as a foreign terrorist organization pursuant to section 219 of the INA.

This designation shall be published in the **Federal Register**.

Dated: February 26, 2008.

Condoleezza Rice,

Secretary of State, Department of State.

[FR Doc. E8–5444 Filed 3–17–08; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice 6137]

In the Matter of the Designation of al-Shabaab, aka al-Shabab, aka Shabaab, aka the Youth, aka Mujahidin Al-Shabaab Movement, aka Mujahideen Youth Movement, aka Mujahidin Youth Movement, aka MYM, aka Harakat Shabab al-Mujahidin, aka Hizbul Shabaab, aka Hisb'ul Shabaab, aka al-Shabaab al-Islamiya, aka Youth Wing, aka al-Shabaab al-Islaam, aka al-Shabaab al-Jihaad, aka the Unity of Islamic Youth as a Specially Designated Global Terrorist pursuant to Section 1(b) of Executive Order 13224, as Amended

Acting under the authority of and in accordance with Section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the organization known as al-Shabaab (aka al-Shabab, aka Shabaab, aka the Youth, aka Mujahidin al-Shabaab Movement, aka Mujahideen Youth Movement, aka Mujahidin Youth Movement, aka MYM, aka Harakat Shabab al-Mujahidin, aka Hizbul Shabaab, aka Hisb'ul Shabaab, aka al-Shabaab al-Islamiya, aka Youth Wing, aka al Shabaab al-Islaam, aka al-Shabaab al-Jihaad, aka the Unity of Islamic Youth) has committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in Section 10 of Executive Order 13224 that ''prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously,'' I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: February 26, 2008.

Condoleezza Rice,

Secretary of State, Department of State.

[FR Doc. E8–5438 Filed 3–17–08; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice 6096]

Renewal of the Advisory Committee on Democracy Promotion

SUMMARY: The charter establishing the Advisory Committee on Democracy Promotion has been renewed for a 2-year period. This committee advises the Secretary of State and the Administrator of the U.S. Agency for International Development on the consideration of issues related to democracy promotion in the formulation and implementation of U.S. foreign policy and foreign assistance.

The committee will continue to follow the procedures prescribed by the Federal Advisory Committee Act (FACA). Meetings will be open to the public unless a determination is made in accordance with the FACA Section 10(d) and 5 U.S.C. 522b(c) (1) and (4) that a meeting or a portion of the meeting should be closed to the public. Unless there are exceptional circumstances, notice of each meeting will be provided in the **Federal Register** at least 15 days prior to the meeting date. If less than 15 days notice is provided, the justification will be included in the **Federal Register** notice.

FOR FURTHER INFORMATION CONTACT: Karen Chen in the Strategic Planning and External Affairs, Bureau of Democracy, Human Rights, and Labor at (202) 647–4648.

Dated: February 11, 2008.

Paula Dobriansky,

Under Secretary for Democracy and Global Affairs, Department of State.

[FR Doc. E8–5434 Filed 3–17–08; 8:45 am]

BILLING CODE 4710–18–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending November 23, 2007

The following Agreements were filed with the Department of Transportation under the Sections 412 and 414 of the Federal Aviation Act, as amended (49 U.S.C. 1383 and 1384) and procedures governing proceedings to enforce these provisions. Answers may be filed within 21 days after the filing of the application.

Docket Number: DOT–OST–2007–0080.

Date Filed: November 21, 2007.

Parties: Members of the International Air Transport Association.

Subject: PSC/RESO/138 dated October 30, 2007, Expedited Resolutions & Recommended Practice, Intended effective dates: 1 January 2008, 1 February 2008 and 1 May 2008.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E8–5344 Filed 3–17–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending November 23, 2007

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2007–0081.

Date Filed: November 21, 2007.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: December 12, 2007.

Description: Application of Air Ecuador Airecu S.A. requesting a foreign air carrier permit and an exemption to engage, as a wet lessee, in (i) scheduled foreign air transportation of persons, property and mail between a point or points in Ecuador and New York, New York coextensive with the rights provided under the U.S.-Ecuador Air Transport agreement, and (ii) charter foreign air transportation of persons, property and mail pursuant to the U.S.-Ecuador Air Transport Agreement and Part 212.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E8–5346 Filed 3–17–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on an Application 07–02-C–00-PFN To Impose a Passenger Facility Charge (PFC) at Panama City/Bay County International Airport (PFN), Panama City, FL and the relocated Panama City-Bay County International Airport (New PFN) and To Use the Revenue from the PFC at New PFN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Request for comments, notice of intent to rule on a PFC application.

SUMMARY: This document requests public comment on the supplementary material provided by the applicant, the Panama City-Bay County Airport and Industrial District (the District), in response to the FAA's requests for clarification of its application to impose a PFC at PFN and, once that airport closes, at the New PFN. The District will use the PFC revenue to construct New PFN.

The FAA received additional documentation and information in support of the District's PFC application, dated July 16, 2007. The FAA is soliciting public comment on this supplementary material. Once received and following the FAA's review of any comments submitted pursuant to this notice, a Final Agency Decision is anticipated either approving or disapproving the application, in whole or in part, within 60 days of the date of this Notice. The ruling will be issued under the provisions of the 49 U.S.C. 40117 and 14 Code of Federal Regulations Part 158 (14 CFR Part 158).

DATES: Comments must be received on or before April 17, 2008.

ADDRESSES: Comments on this supplemental material may be mailed or delivered in triplicate to the FAA at the following address: Financial Analysis and Passenger Facility Charge Branch, 800 Independence Ave., SW., Room 619, Washington, DC 20591.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Randy Curtis, Executive Director, at the following address: Panama City/Bay County International Airport, 3173 Airport Road, Panama City, Florida 32405.

FOR FURTHER INFORMATION CONTACT: Mr. Dennis Walsh, Financial Analysis and Passenger Facility Charge Branch, 800 Independence Ave., SW., Room 619, Washington, DC 20591. (202) 493–4890.

The supplemental information may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the additional documentation provided by the applicant in response to the FAA's requests for clarification and the District, to the FAA in support of the District's application to impose a PFC at PFN and, once that airport closes, at the New PFN and to use the PFC revenue at the New PFN to construct New PFN.

This document requests public comment on the supplementary material provided by the applicant, the Panama City-Bay County Airport and Industrial District (the District), in response to the FAA's requests for clarification of its application to impose a PFC at PFN and, once that airport closes, at the New PFN and to use the PFC revenue at the New PFN to construct New PFN.

The supplemental material includes all documentation provided to the FAA by the District after July 16, 2007, which was the date of the Districts' submission of its PFC application for collection and use of PFC revenue to construct certain portions of New PFN. The FAA will issue a decision on the District's PFC application under the provisions of the 49 U.S.C. 40117 and 14 CFR Part 158.

Background: On July 16, 2007, the District submitted its application to impose a PFC at PFN and, once that airport closes, at the New PFN. The District will use the PFC revenue to construct New PFN.

On August 16, 2007, the FAA sent a letter to the District notifying it that the PFC application was substantially complete.

The FAA's decision making process on PFC applications may include publishing a notice in the **Federal Register** informing the public of the FAA's intention to rule on the pending application and inviting public comment on that application.

Consideration is given to all comments submitted pursuant to the **Federal Register** Notice during FAA's deliberations on the application. The FAA responds to the substantive comments in its Final Agency Decision. The FAA published notice and invited comment on the District's application in the **Federal Register** on August 24, 2007. The deadline for the public to comment closed on September 24, 2007. The FAA did not receive any comments in response to its August 24, 2007 **Federal Register** notice.

In conjunction with rendering its decisions on PFC applications, the FAA determines the PFC eligibility for each project, and whether the eligible projects are adequately justified. In reviewing the application submitted by the District, the FAA discovered that further clarification would be helpful to make its required determinations.

Accordingly, the FAA asked the District to clarify certain information on costs related to Project # 1—the Perimeter Road and Fencing Project and Project #3 Paving/Lighting/NAVAIDS (specifically the NAVAIDS portion); and information related to Project # 6—Facilities (particularly the design of the Public Safety Building for Aircraft Rescue and Firefighting (ARFF)). The FAA also asked the District to provide clarification as to the use of AIP and PFC funding on the projects.

In response to the FAA's requests, the District provided supplemental material in the form of e-mails, which included cost information on perimeter road improvements and NAVAIDS; a revised Exhibit 2; a funding summary; and floor plans of the ARFF building.

Any person may inspect the PFC application and supplementary material submitted by the District to the FAA at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** (call (202) 267–3845 to arrange for access).

In addition, any person may, upon request, inspect the application, notice and supplemental information germane to the application in person at the offices of the District.

Issued in Washington, DC, on March 7, 2008.

Joe Hebert,

Manager, Financial Analysis and Passenger Facility Charge Branch.

[FR Doc. E8–5163 Filed 3–17–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2008–0221]

Operating Limitations at Newark Liberty International Airport

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Order Limiting Scheduled Operations at Newark Liberty International Airport; Request for Comments.

SUMMARY: The Federal Aviation Administration (FAA) has tentatively determined that it is necessary to place a temporary limitation on scheduled flight operations at Newark Liberty International Airport (EWR). The FAA is issuing this proposal as a result of persistent congestion and delays at EWR during the peak operating hours, as well as a dramatic projected increase in flight delays at the airport during the summer of 2008 if proposed schedules were implemented as requested by carriers. We intend this proposed limitation on scheduled operations to relieve the substantial inconvenience to the traveling public caused by excessive congestion-related flight delays at the airport, which magnify as they spread through the National Airspace System. Among other things, this proposal will ensure that projected delays do not increase significantly and provide for a more efficient use of the nation's airspace. The final Order would take effect at 6 a.m., Eastern Time, on June 1, 2008, and would expire at 11:59 p.m., Eastern Time, on October 24, 2009.

This proposed limitation on scheduled operations is necessary to prevent an increase in scheduled flights during peak hours. Flights in certain hours in summer 2007 were in excess of the airport's capacity, and scheduling is a factor in the high level of delays historically experienced at the airport. The proposed limits would apply to all U.S. and foreign air carriers' scheduled operations, excluding helicopters, from 6 a.m., Eastern Time, through 10:59 p.m., Eastern Time. A final Order would be enforceable under the FAA's civil penalty authority. In a separate docket, the FAA intends to propose limits on unscheduled flights at EWR during the same hours, as well as a system to allocate the reservations for the available unscheduled operations. The FAA anticipates that the total number of operations at EWR will be limited to an average of 83 per hour.

DATES: Send your comments on this proposed order on or before April 1, 2008.

ADDRESSES: You may submit comments, identified by docket number FAA–2008–0221, using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments by mail to Docket Operations, U.S. Department of Transportation, M–30, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Persons wishing to receive confirmation of receipt of their written submission should include a self-addressed stamped postcard.
- *Hand Delivery:* Deliver comments to Docket Operations in Room W12–140 on the ground floor of the West Building at 1200 New Jersey Avenue, SE., Washington DC, between 9 a.m. and 5

p.m., Monday through Friday, except Federal holidays.

• *Facsimile:* Fax comments to the docket operations personnel at 202–493–2251.

Privacy: We will post all comments that we receive, without change, at *http://www.regulations.gov*, including any personal information that you provide. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments in any of our dockets, including the name of the individual sending the comment or signing the comment on behalf of an association, business, labor union, or other entity or organization. You may review the DOT's complete Privacy Act Statement in the **Federal Register** at 65 FR 19477–78 (April 11, 2000), or you may find it at *http://docketsinfo.dot.gov.*

Reviewing the docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time and follow the online instructions for accessing the docket; or go to Docket Operations in Room W12–140 on the ground floor of the West Building at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Gerry Shakley, System Operations Services, Air Traffic Organization; telephone—(202) 267–9424; e-mail—*gerry.shakley@faa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Government has exclusive sovereignty over the airspace of the United States.[1] Under this broad authority, Congress has delegated to the Administrator extensive and plenary authority to ensure the safety of aircraft and the efficient use of the nation's navigable airspace. In particular, the Administrator is required to assign the use of navigable airspace by regulation or order under such terms, conditions, and limitations as he may deem necessary to ensure its efficient use.[2] The Administrator also may modify or revoke an assignment when required in the public interest.[3] The FAA construes its statutory directive to act in the public interest as implicitly applying to any decision by the FAA to assign the efficient use of the navigable airspace. Furthermore, in carrying out the Administrator's safety responsibilities under the statute, the Administrator must consider controlling the use of the navigable airspace and regulating civil operations in that airspace in the interest of the safety and efficiency of those operations.[4]

The FAA interprets its broad statutory authority to manage ''the efficient use of airspace'' to encompass its management of the nationwide system of air commerce and air traffic control. On a daily basis, that system regularly transports millions of passengers, thousands of tons of cargo, and millions of pieces of mail. The FAA believes that ensuring the efficient use of the airspace means that it must take all necessary and reasonable steps to prevent extreme congestion at an airport from disrupting or adversely affecting the overall air traffic system for which the FAA is responsible. Inordinate delays at a single airport can ripple throughout other parts of the system, causing losses in time and money for individuals and non-aviation businesses, as well as for U.S. and foreign air carriers.

EWR has historically experienced a significant number of delays relative to other airports. Ranked according to the proportion of delayed operations, EWR has frequently been the most delayed airport in the system. Daily operations have been relatively stable while delays have continued to increase. In Fiscal Year (FY) 2000, there were 1,253 average daily operations. In FY 2007, there were 1,219 average daily operations, a decrease of about 3 percent. Demand during peak hours, however, approaches or exceeds the average runway capacity, resulting in volume-related delays. These are more apparent when weather or other operating conditions reduce the airport's capacity below optimal levels. The percent of on-time gate arrivals within 15 minutes of the scheduled time decreased from 70.66% in FY 2000 to 63.97% in FY 2006 and to 61.71% in FY 2007. The average daily counts of arrival delays greater than one hour were 54 in FY 2000; 79 in FY 2006; and 93 in FY 2007, an increase of almost 18% in the last fiscal year alone.

During the summer of 2007, another New York-area airport, John F. Kennedy International Airport (JFK), also experienced significant congestion-related delays. Based on both airports' summer 2007 performance and absent any major capacity enhancing projects, the FAA designated the airports as Level 2 Schedules Facilitated Airports for the summer 2008 scheduling season, in accordance with the International Air Transport Association (IATA) Worldwide Scheduling Guidelines.[5] In designating the airports as IATA Level 2 Schedules Facilitated Airports, the FAA required all U.S. and foreign air carriers to report to the FAA their proposed summer 2008 scheduled operations at the airports during designated hours.[6]

The information that the U.S. and foreign air carriers reported to the FAA regarding their proposed operations at EWR reflected a significant increase in scheduled operations, especially during already peak hours when the airport routinely experienced delays. In particular, U.S. and foreign air carriers requested about 100 new operations, adding to the schedules that produced pronounced delays during summer 2007. The proposed schedules in the afternoon and evening period were of the greatest concern. For example, several consecutive hours would have had demand for arrivals or departures in the mid-90s and others in the upper 80s. By contrast, EWR's adjusted average airport capacity reflects that, from September 2006 through August 2007, the airport handled or was capable of handling an average of 83 operations per hour.

The FAA modeled the level of delays that passengers transiting EWR could expect if the carriers were to operate the summer 2008 schedules that they proposed. The average arrival delays would have increased 38% to 35 minutes; the average number of arrival delays of at least one hour would have increased 50%; and the mean arrival delay would have reached almost 80 minutes by 7 p.m. Departures would have likewise been impacted.[7]

Moreover, the congestion and delays that the FAA modeled for the proposed EWR schedules would also have an adverse effect on other airports in the region and on the National Airspace System. For example, JFK and LaGuardia Airport, which are located only a few miles from EWR, have

[1] 49 U.S.C. 40103(a).

[2] 49 U.S.C. 40103(b)(1), as previously codified in 49 U.S.C. App. § 307(a). Congress recodified Title 49 of the United States Code in Pub. L. No. 103–222, 108 Stat. 745 (1994), under which the textual revisions were specifically not intended to result in substantive changes to the law. A report describing the recodification stated that the words in §307(a) ''under such terms, conditions, and limitations as he may deem'' were omitted as surplus. H. Rpt. 103–180 (103d Cong., 1st Sess. 1993) at 262.

[3] *Id.*

[4] 49 U.S.C. 40101(d)(4).

[5] 72 FR 54,317 (Sept. 24, 2007).

[6] Since receiving the requested information, the FAA has issued an order limiting scheduled operations at JFK and has designated it an IATA Level 3 Coordinated Airport. 73 FR 3,510 (Jan. 18, 2008)(Order Limiting Scheduled Operations); 72 FR 60,710 (Oct. 25, 2007)(Notice of Airport Level Designation).

[7] As with previous aircraft queuing model runs produced for the FAA by the MITRE Corporation's Center for Advanced Aviation System Development (CAASD), it was assumed that no scheduled operation was cancelled.

consistently been among the nation's most delay-prone airports. The recently approved airspace redesign plan for the New York/New Jersey/Philadelphia metropolitan area documents the costs and far-reaching impacts of delays that emanate from this area.[8]

In response to the U.S. and foreign air carriers' proposed summer 2008 schedules, the FAA held discussions with many of the carriers to validate their schedule requests and to ask them to reconsider their proposed timings in light of the airport's capacity limitations. Although there were some modest revisions to the proposed schedules, it was clear that demand would continue to exceed capacity without further actions. The FAA elected to modify EWR's IATA designation to a Level 3 Coordinated Airport for summer 2008.[9] This designation permitted the FAA the flexibility to focus proposed new operations at the airport on hours during which airport capacity is available and to deny proposed new operations during oversubscribed hours. Some carriers, including Continental Airlines, the primary hub carrier at EWR, moved some historic peak hour flights to less congested times in order to assist with delay reduction. The results of the FAA's discussions with U.S. and foreign air carriers with respect to their summer 2008 schedules are summarized in the appendix to this proposed order. The FAA has also provided individual schedule approval to carriers as part of the IATA Worldwide Scheduling Guidelines review process and other discussions. The individual schedule approval may contain additional information regarding effective dates or schedule changes for parts of the summer 2008 season. Although the appendix summarizes the peak period operations, it is not meant to rescind any prior approvals granted by the FAA for summer 2008.

Despite the relative relief that the approved schedules should yield over the proposed summer 2008 schedules, the FAA, working with the airport operator, carriers, and other customer representatives, has begun to implement a number of short-term initiatives to improve the efficiency of airport operations and the air traffic control system, especially during periods of adverse weather when the effects of overscheduling are more pronounced. The FAA's recently concluded New York Aviation Rulemaking Committee examined congestion issues in the New York area and considered a list of over 77 initiatives that could improve operations in the region, including some that apply specifically to EWR. Moreover, airspace redesign will open additional arrival and departure routes in the New York area to reduce delays and congestion. These measures alone, however, are not expected to provide sufficient near-term gains to accommodate the peak hour schedules at EWR's unrestricted level of demand.

[8] The Record of Decision implementing the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign was issued September 5, 2007 and may be found at: *http://www.faa.gov/airports_airtraffic/air_traffic/nas_redesign/regional_guidance/eastern_reg/nynjphl_redesign/*.

[9] 72 FR 73,418 (Dec. 27, 2007).

II. Summary of the Proposed Operational Limitations

A. Hourly Schedule Limitations

The FAA proposes to limit total operations at EWR during the constrained hours to an average of 83 per hour. Accordingly, the proposed limitation on scheduled operations identified in the appendix is based on the FAA's assessment that EWR's adjusted average airport capacity from September 2006 through August 2007 was 83 operations per hour, and it takes into account the need for some accommodation of unscheduled operations at the airport. In identifying EWR's average adjusted airport capacity, the FAA considered the airport's capacity to be the higher value of either the aircraft throughput at the airport in a given hour or the number of arrivals and departures that air traffic control personnel identified as achievable in that hour. As a result, the FAA accepted the higher number when the airport's performance exceeded expectations, as well as when the airport's potential capacity exceeded demand. This measurement reflects the airport's demonstrated and potential performance over time under actual meteorological and operational conditions.

The modeled delays for the schedules in the appendix will be a significant improvement over the proposed summer 2008 schedules that the carriers filed with the FAA in October 2007, under which the longest arrival delays would increase by up to 50 percent over the summer 2007 levels. The scheduled operations identified in the appendix include an average of almost 82 operations by U.S. and foreign air carriers in certain hours. Some hours are currently below the limit of 81 and will be used for delay mitigation during, at a minimum, the summer of 2008.

The FAA has decided to allocate Operating Authorizations in 30-minute increments. The FAA will continue to work with carriers to smooth their schedules and to adjust the timing of arriving and departing flights within the allocated times. We will also closely monitor the efficiency gains and the reduction in delay from the implementation of airspace redesign and other air traffic control or airport operational changes in order to ensure that our scheduling limits reflect fully the available capacity.

B. Operational Flexibility and Future Airport Growth

Based on the FAA's experience with capacity-constrained airports, we anticipate that U.S. and foreign air carriers may occasionally need to modify their schedule times for operational or other reasons while the Order that we propose is in effect. Accordingly, we acknowledge that the Order should provide a mechanism through which such carriers can modify their schedules. Given the near-saturation of the EWR's peak operational hours, however, it is also essential that any schedule adjustment preserves the stabilizing effect of the operational limits. Therefore, we propose to establish three means through which U.S. and foreign air carriers can change an initial allocation of an Operating Authorization within the period from 6 a.m. through 10:59 p.m.

First, because it is necessary to evaluate the effect of any proposed schedule change, a U.S. or foreign air carrier must obtain the Administrator's written approval before making a schedule change that would be outside the 30-minute window of the allocated Operating Authorization. If we determine that the schedule change will not adversely affect congestion at EWR, the FAA will approve it. Because the FAA wishes to maximize the reduction in delays while accommodating carriers' need for flexibility, the FAA anticipates that it would approve schedule changes that would reduce the overall number of flights in any given hour to or below 81.

Second, if the FAA is unable to approve a proposed schedule change, a U.S. or foreign air carrier may still achieve the scheduling change by trading Operating Authorizations with another carrier. Before any such trade becomes final, the carriers must obtain the Administrator's written approval. Once again, if the FAA determines that the trade will not increase congestion at EWR, it may be approved.

Third, in addition to the permitted trades of Operating Authorizations among U.S. or foreign air carriers, the FAA will permit the leasing of the Operating Authorizations assigned

under the final Order, provided that any lease does not survive the Order's expiration. The carriers may offer or accept any form of consideration in a lease transaction negotiated under the Order. However, the Order is not intended to create a long-term solution to congestion at EWR. Because the Operating Authorizations established under the Order will not create long-term rights at EWR, the FAA will not allow lease transactions that assume that the carrier leasing an Operating Authorization will acquire any right to continue operating flights after the Order expires. Accordingly, permanent sales, purchases, or transfers of Operating Authorizations will not be permitted. In addition, in order to promote meaningful participation in the IATA scheduling process, a carrier may not lease an Operating Authorization unless it has actually used the authorization to conduct flights to or from EWR at least 80% of the time over a consecutive 90-day period.

In the event that any new capacity is realized at EWR during the constrained hours of 6 a.m. through 10:59 p.m. while the final Order is in effect, the FAA intends to allocate it consistent with our responsibility to manage the efficiency of the National Airspace System. New capacity is defined as any hourly capacity above and beyond 81, other than those Operating Authorizations above that level allocated under this Order. As new capacity becomes available, as allocated Operating Authorizations are returned to the FAA, or as currently unallocated Operating Authorizations become available, the FAA plans to lease that capacity. Capacity returned to the FAA as a function of this Order's use-or-lose provision or as a result of a carrier ceasing operations at EWR would also be leased by the FAA, but we would not withdraw existing capacity from any carrier for leasing purposes. We anticipate that each lease will be for a period of up to five years. Leases may be issued pursuant to an auction, with the highest responsive bidder being awarded the lease. Auction procedures will be consistent with our international obligations. Foreign air carriers will be eligible to bid on leases. We will provide additional information about leasing procedures and the relevant statutory authorities before conducting any auction.

Because carriers may wish to initiate operations after the commencement of a scheduling season or to cease operations prior to the end of the season, there may be some available capacity during some periods of both the summer and winter scheduling seasons. It is feasible that some of this capacity could be reintroduced into the system without significantly increasing delays. In addition, the FAA recognizes that a carrier may have a short-term need to conduct operations during these time periods. As a result, we propose that a carrier may request that the FAA allow it to temporarily operate a flight at a time period when there is, for this reason, temporarily idle capacity. The FAA would retain full discretion to determine whether to allow these short-term operations, which would not be afforded historical status when determining Operating Authorizations for the next applicable season. By contrast, any longer-term capacity that is returned by a carrier's failure to adhere to the final order's usage requirement could be reallocated for the next applicable season via an auction procedure.

C. Effect on Limited Incumbents and New Entrants

Throughout the IATA scheduling process, and during our review of all the schedule requests of U.S. and foreign air carriers, the FAA has sought a solution to EWR's burgeoning congestion that is fair to all the carriers. Throughout the process, the FAA was sensitive to the proportionally greater importance a single operation can have to a carrier that operates fewer overall flights at EWR. As a result, in addition to granting all but the largest U.S. air carrier at EWR their historic schedules at every hour if they wished to continue them, carriers were able to add operations from their proposed summer 2008 schedules during the hours in which capacity remained available. Moreover, despite the generally congested peak hours, carriers without any current presence at the airport were able to add one roundtrip within the afternoon and evening hours using the limited available capacity. The resulting schedule carefully balances the competing interests of all carriers at EWR and is the least intrusive on the carriers with the smallest EWR presence, which retain all of their historic and realistically timed new operations at the airport.

In addition, as proposed in the previous subsection of this Order, all carriers will have an opportunity to acquire and to retime operations at EWR while the Order is in effect. Under the Order, all carriers would have the opportunity to trade with others for Operating Authorizations at times that are more desirable to them. In addition, all U.S. and foreign air carriers have the opportunity to lease Operating Authorizations from other carriers for the duration of the Order. Furthermore, in the event that FAA or airport initiatives create new capacity at EWR while the Order is in effect, all carriers—including those without a presence at EWR and those with few operations—would have the opportunity to bid on a leasehold interest in the new operations via an auction process.

D. Foreign Air Carriers

Foreign air carriers are included in the limits proposed in this Order and would be allocated Operating Authorizations based on historic summer 2007 operations or on amended requests for summer 2008 schedules that have been approved by FAA. In November, the FAA met with many of the carriers at the IATA Schedules Conference to review the proposed summer 2008 schedules. Historic operations of foreign air carriers were granted if requested for summer 2008, as were some retimings. Foreign air carriers, like U.S. air carriers, were offered alternative timings when capacity was available, and they may trade or lease Operating Authorizations to change the timing of their operations or to obtain additional Operating Authorizations.

Because the final Order would extend until October 24, 2009, the FAA understands that there may be slight variations with winter timings or allocations that will need to be considered. The FAA does not propose to exceed the limits set forth in the appendix for the winter 2008/2009 scheduling season, but we will work with carriers to address their historic scheduling needs.

E. Usage Requirement and Withdrawals

The FAA has considered whether, in order to encourage maximum utilization of EWR's limited capacity, the final Order should include a usage requirement for the Operating Authorizations that it allocates. Such requirements are common at capacity constrained airports. A usage requirement previously applied at several High Density Rule airports; it continues to apply to Ronald Reagan Washington National Airport under the High Density Rule; and such a requirement applies under the rules currently in effect at Hare International Airport and the orders now governing LaGuardia Airport and JFK. In addition, the IATA Worldwide Scheduling Guidelines include a minimum usage requirement. Including a usage requirement may provide a greater opportunity for carriers to obtain Operating Authorizations in the

secondary market, because carriers may seek to lease them rather than lose Operating Authorizations for underutilization. This could potentially benefit carriers seeking to enter the market or to increase their presence at EWR

In the recently issued order limiting scheduled operations at JFK, as amended, the FAA adopted the IATA Worldwide Scheduling Guidelines requirement for the usage of JFK's Operating Authorizations. We propose a very similar usage requirement at EWR, once again applying an 80% usage threshold. Under the Worldwide Scheduling Guidelines, carriers are required to inform the coordinator of their intended summer and winter operations by January 15 and August 15, respectively.[10] Any operations not declared by these dates are surrendered and are not given historical status for the subsequent applicable scheduling season. However, they also do not count against each carrier's calculated usage rate for use-or-lose purposes. For example, if a carrier were to tell the FAA that it would commence operations on June 1 and cease those operations on August 31, the relevant timeframe for measuring the carrier's usage of the Operating Authorization would be June 1 through August 31, even though the summer scheduling season, in 2008, runs from March 30 until October 25. Assuming the carrier conducted enough flights under the Operating Authorization in the June through August timeframe to receive historical recognition, the carrier would retain the Operating Authorization within the summer 2009 scheduling season, from June 1 through August 31.

The FAA recognizes a distinct merit in this approach in the context of a congested airport like EWR. A strictly seasonal use-or-lose policy would require carriers to operate flights on the shoulders of a scheduling season merely to ensure that they would not lose the Operating Authorization during the few weeks or months when they actually require it. This unnecessary service would have the effect of artificially inflating demand for EWR's limited runway capacity during the spring and fall, leading to an increase in congestion-related delay.

Accordingly, we propose that, for purposes of use-or-lose and historical allocation for subsequent seasons, carriers must tell the FAA when their usage of a particular Operating Authorization will start and stop. Under this approach, because it is now too late to meet the submission date specified in the Worldwide Scheduling Guidelines for summer 2008, carriers must report on or before June 6, 2008, their planned usage of the EWR Operating Authorizations identified in the appendix during summer 2008. Carriers that have previously provided the effective dates of their summer 2008 schedules, and received approval from the FAA for those schedules, do not need to resubmit the information. Thereafter, the carriers' notification to the FAA of their planned usage for winter 2008/2009 and summer 2009 schedules will follow the Worldwide Scheduling Guidelines' schedule. Thus, the FAA will receive initial schedule requests for the winter 2008/2009 scheduling season by the May 15 deadline and coordinate with carriers at the June 2008 IATA Schedules Conference.

With respect to the carriers' reported usage of their Operating Authorizations during or after each scheduling season, the FAA proposes to adopt requirements that are similar to those in the recent JFK order, as amended. Accordingly, carriers would be required to provide the FAA with an interim usage report approximately two months before the end of the scheduling season and a final report at the end of the season. The final report would be due no later than 30 days after the end of the scheduling season.

Recognizing that there may be unexpected times when a carrier's operations are greatly disrupted, the Administrator proposes to retain the authority to waive the 80% usage requirement in the event of a highly unusual and unpredictable condition which is beyond the control of the carrier and which exists for a period of 5 consecutive days or more. Additionally, the FAA will treat as used any Operating Authorization held by a carrier on Thanksgiving Day, the Friday following Thanksgiving Day, and the period from December 24 through the first Saturday in January.

If the FAA determines that a reduction in the number of allocated Operating Authorizations is required to meet operational needs, such as reduced airport capacity, the FAA proposes to conduct a weighted lottery to withdraw Operating Authorizations to meet a reduced hourly or half-hourly limit for scheduled operations.[11] When capacity returns to its previous levels, the withdrawn Operating Authorizations would be returned to the carriers from whom they were withdrawn. The FAA will provide at least 45 days of advance notice of the need for a withdrawal, if possible.

F. Unscheduled Operations

Unscheduled operations, including general aviation, charter flights, and other ad hoc operations, have typically been a small percentage of the overall traffic at EWR. However, given the level of congestion projected for summer 2008, even the addition of a few operations during the oversubscribed hours can exacerbate delays. Although they may not have traditionally appeared in the Official Airline Guide, some charter and other operations are regularly conducted carrier operations, and the FAA considers them to be scheduled operations for the purposes of this Order. Therefore, the carriers that conducted such operations at EWR in summer 2007 would be allocated Operating Authorizations for summer 2008.

The FAA is also considering the issuance of a separate notice of proposed rulemaking (NPRM) proposing to limit the number of unscheduled flights and to require a reservation to operate during controlled hours. During the busiest hours, the number of reservations set aside for unscheduled operations would be reduced to allow for additional scheduled traffic. The FAA expects that under certain operating conditions, additional reservations could be made available for unscheduled operations, provided that significant delay impacts are not expected. Additional information on unscheduled operations and the proposed reservation system will be included in the NPRM, and the FAA will consider any comments received prior to adopting a final rule.

G. Enforcement of This Order

The FAA may enforce the final Order through an enforcement action seeking a civil penalty under 49 U.S.C. 46301(a). Under that provision, a carrier that is not a small business as defined in the Small Business Act, 15 U.S.C. 632, is liable for a civil penalty of up to $25,000 for every day that it violates the limits set forth in the Order. A carrier that is a small business as defined in the Small Business Act is liable for a civil penalty of up to $10,000 for every day that it violates the limits set forth in the Order. The FAA also may file a civil action in

[10] The slot return deadlines were recently changed by IATA from January 31 and August 31.

[11] In a weighted lottery, the risk of having an Operating Authorization withdrawn is proportional to the number of Operating Authorizations that a carrier holds. Thus, those carriers with the greatest number of authorizations are most likely to have an authorization withdrawn. Those with very few operations bear a very small, but still some, risk of having an authorization withdrawn.

U.S. District Court, under 49 U.S.C. 46106, 46107, seeking to enjoin any carrier from violating the terms of the Order.

H. Intermediate- and Long-Term Solutions

While this Order proposes a limitation on the number of scheduled operations at EWR, it is not the FAA's preferred alternative to addressing capacity shortfalls. In the FAA's view, the intermediate- and long-term priority is to expand airport and airway system capacity and to increase the efficient use of existing resources. This is by far the most effective way to serve the traveling public and to promote a strong airport and airway system. Although there is no single action that will solve the problem of congestion in and around New York, the recently concluded New York Aviation Rulemaking Committee, among its many other products, published a list of 77 airport and airspace initiatives that could help to relieve congestion in the New York area. The list is available as appendix C to the committee's report, which is currently available as a link off the FAA's Web site, *http://www.faa.gov*. It includes procedural, technological, and capital improvements that relate to all the major New York area airports, the efficient operation of which are largely interdependent.

While events or technology may overtake the completion of all the 77 listed initiatives, each has the potential to add incrementally to the existing capacity. Most immediately, we anticipate the completion of a number of the items by summer 2008. In addition, as the views expressed in the docket indicate, the full implementation of New York/New Jersey/Philadelphia airspace redesign and the progressive achievement of the Next Generation Air Traffic System's component technologies will also contribute to reducing delay. As a result, to permit time for system improvements to come on line, we propose an expiration date for the final Order of October 24, 2009.

I. Environmental Impact

The agency order stating FAA policies and procedures with respect to the environmental impact of FAA activities, FAA Order 1050.1E, identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined that this Order qualifies for the categorical exclusion identified in paragraph 312d ''Issuance of regulatory documents (e.g., Notices of Proposed Rulemaking and issuance of Final Rules) covering administrative or procedural requirements (Does not include Air Traffic procedures; specific Air Traffic procedures that are categorically excluded are identified under paragraph 311 of this Order.)'' This Order, which proposes a temporary limitation on operations pending a future rulemaking, is in the nature of a rule. No extraordinary circumstances exist that may cause a significant impact and therefore no further environmental review is required.

Accordingly, with respect to scheduled flight operations at EWR, the FAA proposes the following ordering language:

1. This Order assigns operating authority to conduct an arrival or a departure at EWR during the affected hours to the U.S. air carrier or foreign air carrier identified in the appendix to this Order. The FAA will not assign operating authority under this Order to any person or entity other than a certificated U.S. or foreign air carrier with appropriate economic authority and FAA operating authority under 14 CFR part 121, 129, or 135. This Order applies to the following:

a. All U.S. air carriers and foreign air carriers conducting scheduled operations at EWR as of the date of this Order, any U.S. air carrier or foreign air carrier that operates under the same designator code as such a carrier, and any air carrier or foreign-flag carrier that has or enters into a codeshare agreement with such a carrier.

b. All U.S. air carriers or foreign air carriers initiating scheduled or regularly conducted commercial service to EWR while this Order is in effect.

c. The Chief Counsel of the FAA, in consultation with the Vice President, System Operations Services, is the final decision-maker for determinations under this Order.

2. This Order governs scheduled arrivals and departures at EWR from 6 a.m. through 10:59 p.m., Eastern Time, Sunday through Saturday.

3. This Order takes effect at 6 a.m., Eastern Time, on June 1, 2008, and expires at 11:59 p.m., Eastern Time, on October 24, 2009.

4. Under the authority provided to the Secretary of Transportation and the FAA Administrator by 49 U.S.C. 40101, 40103 and 40113, we hereby order that:

a. No U.S. air carrier or foreign air carrier initiating or conducting scheduled or regularly conducted commercial service at EWR may conduct such operations without an Operating Authorization assigned by the FAA.

b. Except as provided in the appendix to this Order, scheduled U.S. air carrier and foreign air carrier arrivals and departures will not exceed 81 per hour from 6 a.m. through 10:59 p.m., Eastern Time.

c. The Administrator may change the limits if he determines that capacity exists to accommodate additional operations without a significant increase in delays.

5. For administrative tracking purposes only, the FAA will assign an identification number to each Operating Authorization.

6. A carrier holding an Operating Authorization may request the Administrator's approval to move any arrival or departure scheduled from 6 a.m. through 10:59 p.m. to another half hour within that period. Except as provided in paragraph seven, the carrier must receive the written approval of the Administrator, or his delegate, prior to conducting any scheduled arrival or departure that is not listed in the appendix to this Order. All requests to move an allocated Operating Authorization must be submitted to the FAA Slot Administration Office, facsimile (202) 267–7277 or e-mail *7-AWA_Slotadmin@faa.gov*, and must come from a designated representative of the carrier. If the FAA cannot approve a carrier's request to move a scheduled arrival or departure, the carrier may then apply for a trade in accordance with paragraph seven.

7. A carrier may lease or trade an Operating Authorization to another carrier for any consideration and for a period that does not exceed the duration of this Order. A carrier may not lease an Operating Authorization unless it has actually used the authorization to conduct flights to or from Newark at least 80% of the time over a consecutive 90-day period. Notice of a trade or lease under this paragraph must be submitted in writing to the FAA Slot Administration Office, facsimile (202) 267–7277 or e-mail *7_AWA_Slotadmin@faa.gov*, and must come from a designated representative of each carrier. The FAA must confirm and approve these transactions in writing prior to the effective date of the transaction. The FAA will approve transfers between carriers under the same marketing control up to five business days after the actual operation, but only to accommodate operational disruptions that occur on the same day of the scheduled operation.

8. A carrier may not buy, sell, trade, or transfer an Operating Authorization, except as described in paragraph seven.

9. Historical rights to Operating Authorizations and withdrawal of those

rights due to insufficient usage will be determined on a seasonal basis and in accordance with the schedule approved by the FAA prior to the commencement of the applicable season.

a. For each day of the week that the FAA has approved an operating schedule, any Operating Authorization not used at least 80% of the time over the period authorized by the FAA under this paragraph will be withdrawn by the FAA for the next applicable season except:

i. The FAA will treat as used any Operating Authorization held by a carrier on Thanksgiving Day, the Friday following Thanksgiving Day, and the period from December 24 through the first Saturday in January.

ii. The Administrator of the FAA may waive the 80% usage requirement in the event of a highly unusual and unpredictable condition which is beyond the control of the carrier and which affects carrier operations for a period of five consecutive days or more.

b. Each carrier holding an Operating Authorization must forward in writing to the FAA Slot Administration Office a list of all Operating Authorizations held by the carrier and for each Operating Authorization:

i. The dates within each applicable season on which it intends to start and to cease scheduled operations.

A. For the summer 2008 scheduling season, the report must be received by the FAA no later than June 6, 2008.

B. For the winter 2008/2009 scheduling season, the report must be received by the FAA no later than August 15, 2008.

C. For the summer 2009 scheduling season, the report must be received by the FAA no later than January 15, 2009.

ii. The completed operations for each day of the applicable scheduling season:

A. No later than September 1 for the summer scheduling season;

B. No later than January 15 for the winter scheduling season.

iii. The completed operations for each day of the scheduling season within 30 days after the last day of the applicable scheduling season.

10. In the event that a carrier surrenders to the FAA any Operating Authorization assigned to it under this Order or if there are unallocated Operating Authorizations, the FAA will determine whether the unallocated Operating Authorizations should be reallocated. The FAA may temporarily allocate an Operating Authorization if it determines that such allocation will not increase congestion at the airport. Such temporary allocations will not be entitled to historical status for the next applicable scheduling season under paragraph 9. Long-term allocations of returned or unallocated Operating Authorizations will be by auction.

11. If the FAA determines that a reduction in the number of allocated Operating Authorizations is required to meet operational needs, such as reduced airport capacity, the FAA will conduct a weighted lottery to withdraw Operating Authorizations to meet a reduced hourly or half-hourly limit for scheduled operations. The FAA will provide at least 45 days' notice unless otherwise required by operational needs. Any Operating Authorization that is withdrawn or temporarily suspended will, if reallocated, be reallocated to the carrier from which it was taken, provided that the carrier continues to operate scheduled service at EWR.

12. The FAA will enforce this Order through an enforcement action seeking a civil penalty under 49 U.S.C. 46301(a). A carrier that is not a small business as defined in the Small Business Act, 15 U.S.C. 632, will be liable for a civil penalty of up to $25,000 for every day that it violates the limits set forth in this Order. A carrier that is a small business as defined in the Small Business Act will be liable for a civil penalty of up to $10,000 for every day that it violates the limits set forth in this Order. The FAA also could file a civil action in U.S. District Court, under 49 U.S.C. 46106, 46107, seeking to enjoin any air carrier from violating the terms of this Order.

13. The FAA may modify or withdraw any provision in this Order on its own or on application by any carrier for good cause shown.

Issued in Washington, DC, on March 12, 2008.

Robert A. Sturgell,

Acting Administrator, Federal Aviation Administration.

APPENDIX—OPERATING LIMITATIONS AT NEWARK LIBERTY INTERNATIONAL AIRPORT (EWR)—AUGUST 2008 PROPOSED AS OF 3/12/2008

[0600–2259 local hours only: 30 minute OA windows]

Seller carrier	Period (LT)	Arr/Dep	Sun	Mon	Tue	Wed	Thu	Fri	Sat
AAL—American Airlines	0600	Departure	2	2	2	2	2	2	2
AAL—American Airlines	0730	Departure	2	2	2	2	2	2	2
AAL—American Airlines	0830	Arrival	1	1	1	1	1	1	1
AAL—American Airlines	0830	Departure	1	1	1	1	1	1	1
AAL—American Airlines	0900	Departure	2	2	2	2	2	2	2
AAL—American Airlines	0930	Arrival	1	1	1	1	1	1	1
AAL—American Airlines	1000	Departure	1	1	1	1	1	1	1
AAL—American Airlines	1030	Arrival	2	2	2	2	2	2	2
AAL—American Airlines	1030	Departure	1	1	1	1	1	1	1
AAL—American Airlines	1100	Arrival	1	1	1	1	1	1	1
AAL—American Airlines	1100	Departure	1	1	1	1	1	1	1
AAL—American Airlines	1130	Departure	1	1	1	1	1	1	1
AAL—American Airlines	1200	Arrival	1	1	1	1	1	1	1
AAL—American Airlines	1200	Departure	1	1	1	1	1	1	1
AAL—American Airlines	1230	Arrival	1	1	1	1	1	1	1
AAL—American Airlines	1230	Departure	1	1	1	1	1	1	1
AAL—American Airlines	1300	Departure	2	2	2	2	2	2	2
AAL—American Airlines	1330	Arrival	3	3	3	3	3	3	3
AAL—American Airlines	1400	Arrival	1	1	1	1	1	1	1
AAL—American Airlines	1400	Departure	1	1	1	1	1	1	1
AAL—American Airlines	1500	Arrival	1	1	1	1	1	1	1
AAL—American Airlines	1500	Departure	1	1	1	1	1	1	1
AAL—American Airlines	1530	Departure	1	1	1	1	1	1	1
AAL—American Airlines	1600	Arrival	3	3	3	3	3	3	3

APPENDIX—OPERATING LIMITATIONS AT NEWARK LIBERTY INTERNATIONAL AIRPORT (EWR)—AUGUST 2008 PROPOSED AS OF 3/12/2008—Continued

[0600–2259 local hours only: 30 minute OA windows]

Seller carrier	Period (LT)	Arr/Dep	Sun	Mon	Tue	Wed	Thu	Fri	Sat
AAL—American Airlines	1630	Arrival	1	1	1	1	1	1	1
AAL—American Airlines	1630	Departure	2	2	2	2	2	2	2
AAL—American Airlines	1700	Departure	3	3	3	3	3	3	3
AAL—American Airlines	1730	Arrival	2	2	2	2	2	2	2
AAL—American Airlines	1800	Departure	1	1	1	1	1	1	1
AAL—American Airlines	1830	Arrival	1	1	1	1	1	1	1
AAL—American Airlines	1830	Departure	1	1	1	1	1	1	1
AAL—American Airlines	1900	Departure	1	1	1	1	1	1	1
AAL—American Airlines	1930	Arrival	1	1	1	1	1	1	1
AAL—American Airlines	1930	Departure	2	2	2	2	2	2	2
AAL—American Airlines	2100	Arrival	2	2	2	2	2	2	2
AAL—American Airlines	2100	Departure	1	1	1	1	1	1	1
AAL—American Airlines	2130	Arrival	1	1	1	1	1	1	1
AAL—American Airlines	2230	Arrival	2	2	2	2	2	2	2
ABX—ABX	0600	Arrival	.....	.....	1	1	1	1	1
ABX—ABX	2230	Departure	.....	1	1	1	1	1	.....
ACA—Air Canada	0600	Departure	1	1	1	1	1	1	1
ACA—Air Canada	0730	Arrival	1	1	1	1	1	1	1
ACA—Air Canada	0800	Arrival	1	1	1	1	1	1	1
ACA—Air Canada	0830	Departure	2	2	2	2	2	2	2
ACA—Air Canada	1000	Arrival	1	1	1	1	1	1	1
ACA—Air Canada	1030	Departure	1	1	1	1	1	1	1
ACA—Air Canada	1130	Arrival	1	1	1	1	1	1	1
ACA—Air Canada	1230	Arrival	1	1	1	1	1	1	1
ACA—Air Canada	1230	Departure	1	1	1	1	1	1	1
ACA—Air Canada	1300	Departure	1	1	1	1	1	1	1
ACA—Air Canada	1330	Arrival	1	1	1	1	1	1	1
ACA—Air Canada	1430	Departure	1	1	1	1	1	1	1
ACA—Air Canada	1530	Arrival	1	1	1	1	1	1	1
ACA—Air Canada	1600	Departure	1	1	1	1	1	1	1
ACA—Air Canada	1700	Arrival	1	1	1	1	1	1	1
ACA—Air Canada	1730	Departure	1	1	1	1	1	1	1
ACA—Air Canada	1800	Arrival	1	1	1	1	1	1	1
ACA—Air Canada	1930	Arrival	1	1	1	1	1	1	1
ACA—Air Canada	1930	Departure	1	1	1	1	1	1	1
ACA—Air Canada	2000	Arrival	1	1	1	1	1	1	1
ACA—Air Canada	2000	Departure	1	1	1	1	1	1	1
ACA—Air Canada	2100	Departure	1	1	1	1	1	1	1
ACA—Air Canada	2200	Arrival	1	1	1	1	1	1	1
AFC—Kalitta	1700	Arrival	.....	1	.....	.....	1	.....	.....
AFR—Air France	1530	Arrival	1	1	1	1	1	1	1
AFR—Air France	1900	Departure	1	1	1	1	1	1	1
AIC—Air India	1600	Arrival	1	1	1	1	1	1	1
AIC—Air India	2100	Departure	1	1	1	1	1	1	1
AIO—Elysair	1600	Arrival	1	1	1	1	1	1	1
AIO—Elysair	1900	Departure	1	1	1	1	1	1	1
AIO—Elysair	2000	Arrival	1	1	1	1	1	1	.....
AIO—Elysair	2200	Departure	1	1	1	1	1	1	.....
ASA—Alaska	0730	Departure	1	1	1	1	1	1	1
ASA—Alaska	1700	Arrival	1	1	1	1	1	1	1
ASA—Alaska	1800	Departure	1	1	1	1	1	1	1
ASA—Alaska	2130	Arrival	1	1	1	1	1	1	1
ATN—Air Transport Intnl	0600	Arrival	.....	1	1	1	1	.....	.....
ATN—Air Transport Intnl	0630	Departure	.....	1	1	1	1	.....	.....
AZA—Alitalia	1530	Arrival	1	1	1	1	1	1	1
AZA—Alitalia	1730	Departure	1	1	1	1	1	1	1
BAW—British Airways	0800	Departure	1	1	1	1	1	1	1
BAW—British Airways	1130	Arrival	1	1	1	1	1	1	1
BAW—British Airways	1730	Arrival	1	1	1	1	1	1	1

APPENDIX—OPERATING LIMITATIONS AT NEWARK LIBERTY INTERNATIONAL AIRPORT (EWR)—AUGUST 2008 PROPOSED AS OF 3/12/2008—Continued

[0600–2259 local hours only: 30 minute OA windows]

Seller carrier	Period (LT)	Arr/Dep	Sun	Mon	Tue	Wed	Thu	Fri	Sat
BAW—British Airways	1830	Departure	1	1	1	1	1	1	1
BAW—British Airways	2100	Departure	1	1	1	1	1	1	1
BAW—British Airways	2130	Arrival	1	1	1	1	1	1	1
COA—Continental	0600	Arrival	4	4	4	4	4	4	4
COA—Continental	0600	Departure	9	9	9	9	9	9	9
COA—Continental	0630	Arrival	1	1	1	1	1	1	1
COA—Continental	0630	Departure	20	20	20	20	20	20	20
COA—Continental	0700	Arrival	6	6	6	6	6	6	6
COA—Continental	0700	Departure	15	15	15	15	15	15	15
COA—Continental	0730	Arrival	19	19	19	19	19	19	19
COA—Continental	0730	Departure	17	17	17	17	17	17	17
COA—Continental	0800	Arrival	14	14	14	14	14	14	14
COA—Continental	0800	Departure	16	16	16	16	16	16	16
COA—Continental	0830	Arrival	7	7	7	7	7	7	7
COA—Continental	0830	Departure	24	24	24	24	24	24	24
COA—Continental	0900	Arrival	6	6	6	6	6	6	6
COA—Continental	0900	Departure	21	21	21	21	21	21	21
COA—Continental	0930	Arrival	9	9	9	9	9	9	9
COA—Continental	0930	Departure	4	4	4	4	4	4	4
COA—Continental	1000	Arrival	10	10	10	10	10	10	10
COA—Continental	1000	Departure	7	7	7	7	7	7	7
COA—Continental	1030	Arrival	7	7	7	7	7	7	7
COA—Continental	1030	Departure	12	12	12	12	12	12	12
COA—Continental	1100	Arrival	18	18	18	18	18	18	18
COA—Continental	1100	Departure	6	6	6	6	6	6	6
COA—Continental	1130	Arrival	14	14	14	14	14	14	14
COA—Continental	1130	Departure	13	13	13	13	13	13	13
COA—Continental	1200	Arrival	14	14	14	14	14	14	14
COA—Continental	1200	Departure	18	18	18	18	18	18	18
COA—Continental	1230	Arrival	19	19	19	19	19	19	19
COA—Continental	1230	Departure	8	8	8	8	8	8	8
COA—Continental	1300	Arrival	10	10	10	10	10	10	10
COA—Continental	1300	Departure	18	18	18	18	18	18	18
COA—Continental	1330	Arrival	20	20	20	20	20	20	20
COA—Continental	1330	Departure	9	9	9	9	9	9	9
COA—Continental	1400	Arrival	17	17	17	17	17	17	17
COA—Continental	1400	Departure	5	5	5	5	5	5	5
COA—Continental	1430	Arrival	17	17	17	17	17	17	17
COA—Continental	1430	Departure	20	20	20	20	20	20	20
COA—Continental	1500	Arrival	17	17	17	17	17	17	17
COA—Continental	1500	Departure	21	21	21	21	21	21	21
COA—Continental	1530	Arrival	19	19	19	19	19	19	19
COA—Continental	1530	Departure	10	10	10	10	10	10	10
COA—Continental	1600	Arrival	11	11	11	11	11	11	11
COA—Continental	1600	Departure	11	11	11	11	11	11	11
COA—Continental	1630	Arrival	19	19	19	19	19	19	19
COA—Continental	1630	Departure	13	13	13	13	13	13	13
COA—Continental	1700	Arrival	13	13	13	13	13	13	13
COA—Continental	1700	Departure	18	18	18	18	18	18	18
COA—Continental	1730	Arrival	6	6	6	6	6	6	6
COA—Continental	1730	Departure	13	13	13	13	13	13	13
COA—Continental	1800	Arrival	16	16	16	16	16	16	16
COA—Continental	1800	Departure	15	15	15	15	15	15	15
COA—Continental	1830	Arrival	13	13	13	13	13	13	13
COA—Continental	1830	Departure	8	8	8	8	8	8	8
COA—Continental	1900	Arrival	20	20	20	20	20	20	20
COA—Continental	1900	Departure	17	17	17	17	17	17	17
COA—Continental	1930	Arrival	8	8	8	8	8	8	8
COA—Continental	1930	Departure	14	14	14	14	14	14	14
COA—Continental	2000	Arrival	18	18	18	18	18	18	18
COA—Continental	2000	Departure	26	26	26	26	26	26	26
COA—Continental	2030	Arrival	9	9	9	9	9	9	9
COA—Continental	2030	Departure	13	13	13	13	13	13	13
COA—Continental	2100	Arrival	8	8	8	8	8	8	8
COA—Continental	2100	Departure	17	17	17	17	17	17	17
COA—Continental	2130	Arrival	16	16	16	16	16	16	16
COA—Continental	2130	Departure	11	11	11	11	11	11	11
COA—Continental	2200	Arrival	11	11	11	11	11	11	11

APPENDIX—OPERATING LIMITATIONS AT NEWARK LIBERTY INTERNATIONAL AIRPORT (EWR)—AUGUST 2008 PROPOSED AS OF 3/12/2008—Continued

[0600–2259 local hours only: 30 minute OA windows]

Seller carrier	Period (LT)	Arr/Dep	Sun	Mon	Tue	Wed	Thu	Fri	Sat
COA—Continental	2200	Departure	6	6	6	6	6	6	6
COA—Continental	2230	Arrival	9	9	9	9	9	9	9
COA—Continental	2230	Departure	1	1	1	1	1	1	1
CSQ—CargoJet	0800	Arrival	.....	1	1	1	1	1	.....
CSQ—CargoJet	2000	Departure	.....	1	1	1	1	1	.....
DAL—Delta Air Lines	0600	Departure	2	2	2	2	2	2	2
DAL—Delta Air Lines	0700	Departure	2	2	2	2	2	2	2
DAL—Delta Air Lines	0730	Departure	1	1	1	1	1	1	1
DAL—Delta Air Lines	0800	Departure	1	1	1	1	1	1	1
DAL—Delta Air Lines	0900	Arrival	1	1	1	1	1	1	1
DAL—Delta Air Lines	0930	Arrival	1	1	1	1	1	1	1
DAL—Delta Air Lines	1000	Departure	2	2	2	2	2	2	2
DAL—Delta Air Lines	1030	Arrival	1	1	1	1	1	1	1
DAL—Delta Air Lines	1100	Departure	1	1	1	1	1	1	1
DAL—Delta Air Lines	1200	Arrival	1	1	1	1	1	1	1
DAL—Delta Air Lines	1230	Arrival	1	1	1	1	1	1	1
DAL—Delta Air Lines	1300	Departure	1	1	1	1	1	1	1
DAL—Delta Air Lines	1330	Departure	1	1	1	1	1	1	1
DAL—Delta Air Lines	1430	Arrival	1	1	1	1	1	1	1
DAL—Delta Air Lines	1500	Departure	1	1	1	1	1	1	1
DAL—Delta Air Lines	1600	Arrival	1	1	1	1	1	1	1
DAL—Delta Air Lines	1630	Arrival	1	1	1	1	1	1	1
DAL—Delta Air Lines	1630	Departure	1	1	1	1	1	1	1
DAL—Delta Air Lines	1700	Arrival	1	1	1	1	1	1	1
DAL—Delta Air Lines	1700	Departure	1	1	1	1	1	1	1
DAL—Delta Air Lines	1730	Arrival	1	1	1	1	1	1	1
DAL—Delta Air Lines	1730	Departure	1	1	1	1	1	1	1
DAL—Delta Air Lines	1800	Departure	1	1	1	1	1	1	1
DAL—Delta Air Lines	1830	Arrival	1	1	1	1	1	1	1
DAL—Delta Air Lines	1900	Departure	1	1	1	1	1	1	1
DAL—Delta Air Lines	1930	Arrival	1	1	1	1	1	1	1
DAL—Delta Air Lines	2100	Arrival	1	1	1	1	1	1	1
DAL—Delta Air Lines	2130	Arrival	1	1	1	1	1	1	1
DAL—Delta Air Lines	2230	Arrival	1	1	1	1	1	1	1
DLH—Lufthansa	1100	Arrival	1	1	1	1	1	1	1
DLH—Lufthansa	1200	Arrival	1	1	1	1	1	1	1
DLH—Lufthansa	1530	Arrival	1	1	1	1	1	1	1
DLH—Lufthansa	1530	Departure	1	1	1	1	1	1	1
DLH—Lufthansa	1630	Departure	1	1	1	1	1	1	1
DLH—Lufthansa	1730	Departure	1	1	1	1	1	1	1
DLH—Lufthansa	1830	Arrival	1	1	1	1	1	1	1
DLH—Lufthansa	2000	Departure	1	1	1	1	1	1	1
ELY—El Al	1430	Departure	1	1	1	1	1	.....	.....
ESS—Eos Airlines	1200	Arrival	.....	1	.....	.....	.....	.....	1
ESS—Eos Airlines	1700	Arrival	1	0	1	1	1	1	0
ESS—Eos Airlines	1930	Departure	1	1	1	1	1	1	1
EVA—Eva Airways	2130	Arrival	.....	1	.....	1	.....	.....	1
FDX—FedEx	0600	Arrival	.....	.....	2	2	2	2	.....
FDX—FedEx	0630	Arrival	.....	.....	1	1	1	1	2
FDX—FedEx	0700	Arrival	.....	.....	.....	.....	.....	.....	1
FDX—FedEx	0700	Departure	.....	.....	1	1	1	1	.....
FDX—FedEx	0730	Arrival	.....	.....	.....	.....	.....	1	.....
FDX—FedEx	0730	Departure	.....	.....	1	1	1	.....	1
FDX—FedEx	0800	Departure	1	.....	.....	.....	.....	.....	1
FDX—FedEx	0830	Departure	1	.....	2	2	2	2	2
FDX—FedEx	0900	Arrival	.....	.....	1	1	1	1	.....
FDX—FedEx	0900	Departure	.....	.....	.....	.....	.....	1	.....
FDX—FedEx	1000	Arrival	.....	.....	1	1	1	1	.....
FDX—FedEx	1200	Arrival	.....	.....	1	1	1	.....	.....
FDX—FedEx	1400	Arrival	.....	.....	1	1	1	1	1
FDX—FedEx	1400	Departure	.....	.....	1	1	1	.....	.....
FDX—FedEx	1530	Departure	.....	.....	1	1	1	1	1

APPENDIX—OPERATING LIMITATIONS AT NEWARK LIBERTY INTERNATIONAL AIRPORT (EWR)—AUGUST 2008 PROPOSED AS OF 3/12/2008—Continued

[0600–2259 local hours only: 30 minute OA windows]

Seller carrier	Period (LT)	Arr/Dep	Sun	Mon	Tue	Wed	Thu	Fri	Sat
FDX—FedEx	1600	Arrival	.....	.....	1	1	1	1	1
FDX—FedEx	1600	Departure	.....	.....	1	1	1	1	.....
FDX—FedEx	1730	Arrival	.....	.....	1	1	1	.....	.....
FDX—FedEx	1830	Arrival	1	.....	1	1	1	1	1
FDX—FedEx	1900	Arrival	1	.....	1	1	1	1	1
FDX—FedEx	1930	Arrival	.....	.....	.....	.....	.....	.....	1
FDX—FedEx	2000	Arrival	1	.....	.....	.....	.....	.....	.....
FDX—FedEx	2030	Arrival	1	.....	.....	.....	.....	.....	.....
FDX—FedEx	2130	Departure	.....	1	1	1	1	1	.....
FDX—FedEx	2230	Arrival	.....	.....	.....	.....	.....	1	1
FDX—FedEx	2230	Departure	.....	3	3	3	4	.....	.....
FJT—Silverjet	1300	Arrival	1	1	1	1	1	1	1
FJT—Silverjet	1930	Departure	1	1	1	1	1	1	1
FJT—Silverjet	2100	Arrival	1	1	1	1	1	1	1
FJT—Silverjet	2230	Departure	1	1	1	1	1	1	1
JAI—Jet Airways	1130	Arrival	1	1	1	1	1	1	1
JAI—Jet Airways	2000	Departure	1	1	1	1	1	1	1
JBU—JetBlue	0730	Departure	1	1	1	1	1	1	1
JBU—JetBlue	0800	Arrival	1	1	1	1	1	1	1
JBU—JetBlue	0800	Departure	1	1	1	1	1	1	1
JBU—JetBlue	0900	Departure	2	2	2	2	2	2	2
JBU—JetBlue	1030	Arrival	1	1	1	1	1	1	1
JBU—JetBlue	1100	Departure	1	1	1	1	1	1	1
JBU—JetBlue	1200	Arrival	1	1	1	1	1	1	1
JBU—JetBlue	1230	Arrival	1	1	1	1	1	1	1
JBU—JetBlue	1230	Departure	1	1	1	1	1	1	1
JBU—JetBlue	1330	Arrival	1	1	1	1	1	1	1
JBU—JetBlue	1330	Departure	1	1	1	1	1	1	1
JBU—JetBlue	1400	Departure	1	1	1	1	1	1	1
JBU—JetBlue	1430	Arrival	1	1	1	1	1	1	1
JBU—JetBlue	1500	Departure	1	1	1	1	1	1	1
JBU—JetBlue	1600	Arrival	1	1	1	1	1	1	1
JBU—JetBlue	1630	Arrival	1	1	1	1	1	1	1
JBU—JetBlue	1630	Departure	1	1	1	1	1	1	1
JBU—JetBlue	1730	Arrival	1	1	1	1	1	1	1
JBU—JetBlue	1730	Departure	1	1	1	1	1	1	1
JBU—JetBlue	1830	Departure	1	1	1	1	1	1	1
JBU—JetBlue	2030	Arrival	2	2	2	2	2	2	2
JBU—JetBlue	2100	Departure	2	2	2	2	2	2	2
JBU—JetBlue	2130	Arrival	1	1	1	1	1	1	1
JBU—JetBlue	2200	Arrival	1	1	1	1	1	1	1
LOT—LOT Polish Airlines	1630	Arrival	1	1	1	1	1	1	1
LOT—LOT Polish Airlines	1830	Departure	1	1	1	1	1	1	1
LOT—LOT Polish Airlines	2100	Arrival	1	1	1	1	1	.....	1
MAS—Malaysia	1900	Arrival	.....	1	.....	.....	1	.....	1
MAS—Malaysia	2200	Departure	.....	1	.....	.....	1	.....	1
MEP—Midwest Airlines	0600	Departure	1	1	1	1	1	1	1
MEP—Midwest Airlines	1030	Arrival	1	1	1	1	1	1	1
MEP—Midwest Airlines	1100	Departure	1	1	1	1	1	1	1
MEP—Midwest Airlines	1430	Arrival	1	1	1	1	1	1	1
MEP—Midwest Airlines	1500	Departure	1	1	1	1	1	1	1
MEP—Midwest Airlines	1630	Arrival	1	1	1	1	1	1	1
MEP—Midwest Airlines	1700	Departure	1	1	1	1	1	1	1
MEP—Midwest Airlines	2000	Arrival	1	1	1	1	1	1	1
MEP—Midwest Airlines	2030	Departure	1	1	1	1	1	1	1
MEP—Midwest Airlines	2230	Arrival	1	1	1	1	1	1	1
NWA—Northwest	0600	Departure	2	2	2	2	2	2	2
NWA—Northwest	0630	Departure	1	1	1	1	1	1	1
NWA—Northwest	0700	Departure	1	1	1	1	1	1	1
NWA—Northwest	0800	Arrival	1	1	1	1	1	1	1
NWA—Northwest	0800	Departure	1	1	1	1	1	1	1
NWA—Northwest	0900	Departure	1	1	1	1	1	1	1

APPENDIX—OPERATING LIMITATIONS AT NEWARK LIBERTY INTERNATIONAL AIRPORT (EWR)—AUGUST 2008 PROPOSED AS OF 3/12/2008—Continued

[0600–2259 local hours only: 30 minute OA windows]

Seller carrier	Period (LT)	Arr/Dep	Sun	Mon	Tue	Wed	Thu	Fri	Sat
NWA—Northwest	1030	Arrival	1	1	1	1	1	1	1
NWA—Northwest	1100	Departure	1	1	1	1	1	1	1
NWA—Northwest	1130	Arrival	1	1	1	1	1	1	1
NWA—Northwest	1200	Arrival	1	1	1	1	1	1	1
NWA—Northwest	1230	Departure	1	1	1	1	1	1	1
NWA—Northwest	1300	Arrival	1	1	1	1	1	1	1
NWA—Northwest	1300	Departure	1	1	1	1	1	1	1
NWA—Northwest	1400	Arrival	2	2	2	2	2	2	2
NWA—Northwest	1530	Departure	1	1	1	1	1	1	1
NWA—Northwest	1600	Departure	1	1	1	1	1	1	1
NWA—Northwest	1630	Arrival	1	1	1	1	1	1	1
NWA—Northwest	1630	Departure	1	1	1	1	1	1	1
NWA—Northwest	1700	Departure	1	1	1	1	1	1	1
NWA—Northwest	1800	Arrival	1	1	1	1	1	1	1
NWA—Northwest	1800	Departure	1	1	1	1	1	1	1
NWA—Northwest	1900	Arrival	1	1	1	1	1	1	1
NWA—Northwest	1930	Departure	1	1	1	1	1	1	1
NWA—Northwest	2030	Departure	1	1	1	1	1	1	1
NWA—Northwest	2100	Arrival	2	2	2	2	2	2	2
NWA—Northwest	2130	Arrival	1	1	1	1	1	1	1
NWA—Northwest	2230	Arrival	3	3	3	3	3	3	3
POE—Porter	0630	Departure	1	1	1	1	1	1	1
POE—Porter	0800	Arrival	.....	1	1	1	1	1	.....
POE—Porter	0900	Departure	.....	1	1	1	1	1	.....
POE—Porter	1030	Arrival	.....	1	1	1	1	1	.....
POE—Porter	1130	Departure	.....	1	1	1	1	1	.....
POE—Porter	1230	Arrival	.....	1	1	1	1	1	.....
POE—Porter	1330	Departure	.....	1	1	1	1	1	1
POE—Porter	1500	Arrival	1	1	1	1	1	1	1
POE—Porter	1600	Departure	1	1	1	1	1	1	1
POE—Porter	2100	Arrival	1	1	1	1	1	1	1
POE—Porter	2130	Departure	1	1	1	1	1	1	1
QTR—Qatar	1830	Arrival	1	1	1	1	1	1	1
QTR—Qatar	2030	Departure	1	1	1	1	1	1	1
SAS—SAS	1300	Arrival	1	1	1	1	1	1	1
SAS—SAS	1430	Arrival	1	1	1	1	1	1	1
SAS—SAS	1700	Departure	1	1	1	1	1	1	1
SAS—SAS	1730	Departure	1	1	1	1	1	1	1
SAS—SAS	2100	Arrival	.....	1	.....	.....	1	1	1
SIA—Singapore	1730	Arrival	1	1	1	1	1	1	1
SWR—Swiss	2000	Arrival	1	1	1	1	1	1	.....
SWR—Swiss	2130	Departure	1	1	1	1	1	1	.....
TAP—Air Portugal	1400	Arrival	1	.....	1	1	.....	1	.....
TAP—Air Portugal	1430	Arrival	1	1	1	1	1	1	1
TAP—Air Portugal	1800	Departure	1	1	1	1	1	1	1
TAP—Air Portugal	2030	Departure	1	.....	1	1	.....	1	.....
TRS—Air Tran Airlines	0600	Departure	1	1	1	1	1	1	1
TRS—Air Tran Airlines	1030	Arrival	1	1	1	1	1	1	1
TRS—Air Tran Airlines	1100	Departure	1	1	1	1	1	1	1
TRS—Air Tran Airlines	1130	Arrival	1	1	1	1	1	1	1
TRS—Air Tran Airlines	1200	Departure	1	1	1	1	1	1	1
TRS—Air Tran Airlines	1230	Arrival	1	1	1	1	1	1	1
TRS—Air Tran Airlines	1330	Arrival	1	1	1	1	1	1	1
TRS—Air Tran Airlines	1400	Departure	1	1	1	1	1	1	1
TRS—Air Tran Airlines	1430	Departure	1	1	1	1	1	1	1
TRS—Air Tran Airlines	1530	Arrival	1	1	1	1	1	1	1
TRS—Air Tran Airlines	1630	Departure	1	1	1	1	1	1	1
TRS—Air Tran Airlines	1900	Arrival	1	1	1	1	1	1	1
TRS—Air Tran Airlines	1930	Departure	1	1	1	1	1	1	1
UAL—United Airlines	0600	Departure	2	2	2	2	2	2	2
UAL—United Airlines	0630	Arrival	2	2	2	2	2	2	2

APPENDIX—OPERATING LIMITATIONS AT NEWARK LIBERTY INTERNATIONAL AIRPORT (EWR)—AUGUST 2008 PROPOSED AS OF 3/12/2008—Continued

[0600–2259 local hours only: 30 minute OA windows]

Seller carrier	Period (LT)	Arr/Dep	Sun	Mon	Tue	Wed	Thu	Fri	Sat
UAL—United Airlines	0700	Departure	1	1	1	1	1	1	1
UAL—United Airlines	0730	Departure	3	3	3	3	3	3	3
UAL—United Airlines	0900	Arrival	1	1	1	1	1	1	1
UAL—United Airlines	0900	Departure	1	1	1	1	1	1	1
UAL—United Airlines	0930	Arrival	1	1	1	1	1	1	1
UAL—United Airlines	1000	Departure	2	2	2	2	2	2	2
UAL—United Airlines	1200	Arrival	1	1	1	1	1	1	1
UAL—United Airlines	1230	Departure	1	1	1	1	1	1	1
UAL—United Airlines	1330	Arrival	2	2	2	2	2	2	2
UAL—United Airlines	1430	Departure	2	2	2	2	2	2	2
UAL—United Airlines	1600	Arrival	1	1	1	1	1	1	1
UAL—United Airlines	1630	Arrival	1	1	1	1	1	1	1
UAL—United Airlines	1700	Departure	1	1	1	1	1	1	1
UAL—United Airlines	1730	Arrival	1	1	1	1	1	1	1
UAL—United Airlines	1730	Departure	1	1	1	1	1	1	1
UAL—United Airlines	1800	Arrival	1	1	1	1	1	1	1
UAL—United Airlines	1800	Departure	1	1	1	1	1	1	1
UAL—United Airlines	1830	Arrival	1	1	1	1	1	1	1
UAL—United Airlines	1830	Departure	1	1	1	1	1	1	1
UAL—United Airlines	1900	Arrival	1	1	1	1	1	1	1
UAL—United Airlines	1900	Departure	1	1	1	1	1	1	1
UAL—United Airlines	2000	Departure	1	1	1	1	1	1	1
UAL—United Airlines	2130	Arrival	2	2	2	2	2	2	2
UPS—UPS	0600	Arrival	0	0	0	0	0	1	1
UPS—UPS	0730	Arrival	0	0	1	1	1	1	0
UPS—UPS	0730	Departure	0	1	0	0	0	0	0
UPS—UPS	0800	Departure	0	0	3	3	3	2	0
UPS—UPS	0830	Departure	0	0	1	1	1	1	1
UPS—UPS	0930	Arrival	0	1	0	0	0	0	0
UPS—UPS	1000	Departure	0	0	0	0	0	0	1
UPS—UPS	1130	Departure	0	1	0	0	0	0	0
UPS—UPS	1700	Arrival	0	0	0	0	0	0	1
UPS—UPS	1730	Arrival	0	0	1	1	1	0	0
UPS—UPS	1800	Arrival	1	0	0	0	0	0	0
UPS—UPS	1830	Arrival	0	1	1	1	1	0	0
UPS—UPS	1930	Arrival	0	0	1	1	1	0	0
UPS—UPS	2100	Arrival	0	0	0	0	0	1	0
UPS—UPS	2200	Departure	0	1	1	1	1	1	0
UPS—UPS	2230	Departure	0	1	1	1	1	0	0
USA—US Airways	0600	Departure	1	1	1	1	1	1	1
USA—US Airways	0630	Departure	2	2	2	2	2	2	2
USA—US Airways	0730	Arrival	1	1	1	1	1	1	1
USA—US Airways	0800	Departure	1	1	1	1	1	1	1
USA—US Airways	0930	Arrival	1	1	1	1	1	1	1
USA—US Airways	1000	Arrival	1	1	1	1	1	1	1
USA—US Airways	1000	Departure	2	2	2	2	2	2	2
USA—US Airways	1030	Departure	1	1	1	1	1	1	1
USA—US Airways	1130	Arrival	1	1	1	1	1	1	1
USA—US Airways	1230	Departure	1	1	1	1	1	1	1
USA—US Airways	1300	Arrival	1	1	1	1	1	1	1
USA—US Airways	1330	Arrival	2	2	2	2	2	2	2
USA—US Airways	1400	Arrival	1	1	1	1	1	1	1
USA—US Airways	1430	Departure	2	2	2	2	2	2	2
USA—US Airways	1500	Departure	1	1	1	1	1	1	1
USA—US Airways	1630	Departure	1	1	1	1	1	1	1
USA—US Airways	1700	Arrival	2	2	2	2	2	2	2
USA—US Airways	1800	Arrival	1	1	1	1	1	1	1
USA—US Airways	1800	Departure	2	2	2	2	2	2	2
USA—US Airways	1830	Departure	1	1	1	1	1	1	1
USA—US Airways	1900	Arrival	1	1	1	1	1	1	1
USA—US Airways	2000	Arrival	2	2	2	2	2	2	2
USA—US Airways	2100	Departure	1	1	1	1	1	1	1
USA—US Airways	2130	Arrival	1	1	1	1	1	1	1
VIR—Virgin Atlantic	0800	Departure	1	1	1	1	1	1	1
VIR—Virgin Atlantic	1830	Arrival	1	1	1	1	1	1	1

APPENDIX—OPERATING LIMITATIONS AT NEWARK LIBERTY INTERNATIONAL AIRPORT (EWR)—AUGUST 2008 PROPOSED AS OF 3/12/2008—Continued

[0600–2259 local hours only: 30 minute OA windows]

Seller carrier	Period (LT)	Arr/Dep	Sun	Mon	Tue	Wed	Thu	Fri	Sat
VIR—Virgin Atlantic	2100	Arrival	1	1	1	1	1	1	1
VRD—Virgin America *	0630	Arrival	1	1	1	1	1	1	1
VRD—Virgin America *	0930	Departure	1	1	1	1	1	1	1
VRD—Virgin America *	1000	Arrival	1	1	1	1	1	1	1
VRD—Virgin America *	1030	Departure	1	1	1	1	1	1	1
VRD—Virgin America *	1100	Arrival	1	1	1	1	1	1	1
VRD—Virgin America *	1130	Departure	1	1	1	1	1	1	1
WJA—WestJet	1630	Arrival	1	1	1	1	1	1	1
WJA—WestJet	1800	Departure	1	1	1	1	1	1	1

* Pending.

[FR Doc. 08–1037 Filed 3–12–08; 4:55 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Sunshine Act Meetings; Unified Carrier Registration Plan Board of Directors

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

TIME AND DATE: April 10, 2008, 11 a.m. to 2 p.m., Eastern Daylight Time.

PLACE: This meeting will take place telephonically. Any interested person may call Mr. Avelino Gutierrez at (505) 827–4565 to receive the toll free numbers and pass codes needed to participate in these meetings by telephone.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Board of Directors (the Board) will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement and to that end, may consider matters properly before the Board.

FOR FURTHER INFORMATION CONTACT: Mr. Avelino Gutierrez, Chair, Unified Carrier Registration Board of Directors at (505) 827–4565.

Dated: March 12, 2008.

William A. Quade,

Associate Administrator for Enforcement and Program Delivery.

[FR Doc. 08–1054 Filed 3–14–08; 2:25 pm]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief from the Requirements of Title 49 Code of Federal Regulations Part 236

Pursuant to Title 49 Code of Federal Regulations (CFR) Part 235 and 49 U.S.C. 20502(a), the following railroad has petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR Part 236, as detailed below.

[Docket Number FRA–2008–0010]

Applicant: Northwestern Pacific Railroad Company, Mr. John H. Williams, President, 385 Sherman Avenue, Suite 1, Palo Alto, California 94306–1840.

The Northwestern Pacific Railroad Company (NWP) seeks approval of the proposed discontinuance and removal of the interlocking signal systems on three drawbridges that are located between a point near Lombard, California, at Milepost (MP) 63.4 and a point near Petaluma, California, at MP 38.5 on the NWP's Russian River Division at the following three locations: Brazos Drawbridge, MP 64.7; Black Point Drawbridge, MP 28.7; and Haystack Landing Drawbridge, MP 37.2.

The reason given for the proposed changes is that the three interlocking signal systems have not been in service for the last seven years and have fallen into disrepair. The signal systems do not presently comply with FRA requirements for these types of systems.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and include a concise statement of the interest of the party in the proceeding. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

FRA expects to be able to determine these matters without an oral hearing. However, if a specific request for an oral hearing is accompanied by a showing that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

All communications concerning this proceeding should be identified by Docket Number FRA–2008–0010 and may be submitted by one of the following methods:

Web site: http://www.regulations.gov. Follow the instructions for submitting comments on the DOT electronic site;

Fax: 202–493–2251;

Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590; or

Hand Delivery: Room W12–140 of the U.S. Department of Transportation West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.—5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

FRA wishes to inform all potential commenters that anyone is able to

search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–19478) or you may visit *http://www.regulations.gov*.

Issued in Washington, DC on March 12, 2008.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8–5369 Filed 3–17–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–290 (Sub–No. 302X)]

Norfolk Southern Railway Company—Abandonment Exemption—in East Whiteland Township, Chester County, PA

Norfolk Southern Railway Company (NSR) has filed a verified notice of exemption under 49 CFR Part 1152 Subpart F—*Exempt Abandonments* to abandon a 0.75-mile line of railroad extending between milepost DX 10.65 and milepost DX 11.40 in East Whiteland Township, Chester County, PA. The line traverses United States Postal Service Zip Code 19355, and includes the former station of Cedar Hollow.

NSR has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic can be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements of 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on April 17, 2008, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by March 28, 2008. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by April 7, 2008, with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to NSR's representative: John V. Edwards, Senior General Attorney, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

NSR has filed environmental and historic reports which address the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by March 21, 2008. Interested persons may obtain a copy of the EA by writing to SEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 245–0305. (Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.) Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), NSR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by NSR's filing of a notice of consummation by March 18, 2009, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: March 4, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Anne K. Quinlan,

Acting Secretary.

[FR Doc. E8–4642 Filed 3–17–08; 8:45 am]

BILLING CODE 4915–01–P

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each OFA must be accompanied by the filing fee, which currently is set at $1,300. *See* 49 CFR 1002.2(f)(25).

DEPARTMENT OF VETERANS AFFAIRS

Special Medical Advisory Group; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Special Medical Advisory Group will meet on May 9, 2008 in Room 830 from 8:30 a.m. to 3 p.m. at VA Central Office, 810 Vermont Avenue, NW., Washington, DC. The meeting is open to the public.

The purpose of the Group is to advise the Secretary of Veterans Affairs and the Under Secretary for Health on the care and treatment of disabled veterans, and other matters pertinent to the Department's Veterans Health Administration (VHA).

The agenda for the meeting will include discussions of the evolving relationship between VA and the Department of Defense, of mental health and traumatic brain injury, on building versus partnering, and an update on research.

Any member of the public wishing to attend should contact Juanita Leslie, Committee Manager, Office of Administrative Operations (10B2), Veterans Health Administration, Department of Veterans Affairs at (202) 461–7019. No time will be set aside at this meeting for receiving oral presentations from the public. Statements, in written form, may be submitted to Juanita Leslie before the meeting or within 10 days after the meeting.

Dated: March 10, 2008.

By Direction of the Secretary:

E. Philip Riggin,

Committee Management Officer.

[FR Doc. E8–5199 Filed 3–17–08; 8:45 am]

BILLING CODE 8320–01–M

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Prosthetics and Special Disabilities Programs; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Advisory Committee on Prosthetics and Special Disabilities Programs will be held April 9–10, 2008, in Room 230, at VA Central Office, 810 Vermont Avenue, NW., Washington, DC. The sessions will convene at 8:30 a.m. each day and will adjourn at 4:30 p.m. on April 9 and will end at 12 Noon on April 10. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on VA's prosthetic programs designed to provide state-of-the-art prosthetics and the associated rehabilitation research, development, and evaluation of such technology. The Committee also provides advice to the Secretary on special disability programs which are defined as any program administered by the Secretary to serve veterans with spinal cord injury, blindness or visual impairment, loss of extremities or loss of function, deafness or hearing impairment, and other serious incapacities in terms of daily life functions.

On April 9, the Committee will be briefed by the Chief Consultant for Rehabilitation Services; Director, Chiropractic Care; Assistant Director, Compensation and Pension Service, Veterans Benefits Administration; Chief Consultant, Office of Care Coordination; Director, Physical Medicine and Rehabilitation Service; Acting Director, Blind Rehabilitation Service and Chief Consultant, Spinal Cord Injury and Disorders. On April 10, the Committee will be briefed by the Chief, Library Service.

Time is not allocated for receiving oral presentations from the public. However, members of the public may direct questions or submit written statements in advance of the meeting for review by the Committee to Mr. Larry N. Long, Designated Federal Officer, Veterans Health Administration, Patient Care Services, Rehabilitation Services, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Any member of the public wishing to attend the meeting should contact Mr. Long at (202) 461–7354.

Dated: March 11, 2008.

By Direction of the Secretary:

E. Philip Riggin,

Committee Management Officer.

[FR Doc. E8–5319 Filed 3–17–08; 8:45 am]

BILLING CODE 8320–01–M

Federal Register

Tuesday,
March 18, 2008

Part II

Social Security Administration

20 CFR Part 404

Revised Medical Criteria for Evaluating Immune System Disorders; Final rule

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 404

[Docket No. SSA 2006–0070]

RIN 0960–AF33

Revised Medical Criteria for Evaluating Immune System Disorders

AGENCY: Social Security Administration.

ACTION: Final Rules.

SUMMARY: We are revising the criteria in the Listing of Impairments (the listings) that we use to evaluate claims involving immune system disorders. We apply these criteria when you claim benefits based on disability under title II and title XVI of the Social Security Act (the Act). The revisions reflect our adjudicative experience, as well as advances in medical knowledge, treatment, and methods of evaluating immune system disorders.

DATES: These rules are effective June 16, 2008.

FOR FURTHER INFORMATION CONTACT: Paul Scott, Office of Compassionate Allowances and Listings Improvement, Social Security Administration, 4422 Annex Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 966–1192. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet Web site, Social Security Online at *http://www.socialsecurity.gov/*.

SUPPLEMENTARY INFORMATION:

Electronic Version

The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html*.

Background

We are revising and making final the rules we proposed for evaluating immune system disorders in the Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** on August 4, 2006 (71 FR 44432, corrected at 71 FR 46983). We provide a summary of the provisions of the final rules below, with an explanation of the changes we have made from the text in the NPRM. We then provide summaries of the public comments on the NPRM and our reasons for adopting or not adopting the recommendations in those comments in the section ''Public Comments on the NPRM.'' The final rule language follows that section.

What Programs Do These Final Rules Affect?

These final rules affect disability determinations and decisions that we make under title II and title XVI of the Act. In addition, to the extent that Medicare entitlement and Medicaid eligibility are based on whether you qualify for disability benefits under title II and title XVI, these final rules also affect the Medicare and Medicaid programs.

Who Can Get Disability Benefits?

Under title II of the Act, we provide for the payment of disability benefits if you are disabled and belong to one of the following three groups:

- Workers insured under the Act,
- Children of insured workers, and
- Widows, widowers, and surviving divorced spouses (see § 404.336) of insured workers.

Under title XVI of the Act, we provide for Supplemental Security Income (SSI) payments on the basis of disability if you are disabled and have limited income and resources.

How do we define disability?

Under both the title II and title XVI programs, disability must be the result of any medically determinable physical or mental impairment or combination of impairments that is expected to result in death or which has lasted or is expected to last for a continuous period of at least 12 months. Our definitions of disability are shown in the following table:

If you file a claim under . . .	And you are . . .	Disability means you have a medically determinable impairment(s) as described above that results in . . .
title II	an adult or a child	the inability to do any substantial gainful activity (SGA).
title XVI	an individual age 18 or older	the inability to do any SGA.
title XVI	an individual under age 18	marked and severe functional limitations.

How do we decide whether you are disabled?

If you are applying for benefits under title II of the Act, or if you are an adult applying for payments under title XVI of the Act, we use a five-step ''sequential evaluation process'' to decide whether you are disabled. We describe this five-step process in our regulations at §§ 404.1520 and 416.920. We follow the five steps in order and stop as soon as we can make a determination or decision. The steps are:

1. Are you working, and is the work you are doing substantial gainful activity? If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled, regardless of your medical condition or your age, education, and work experience. If you are not, we will go on to step 2.

2. Do you have a ''severe'' impairment? If you do not have an impairment or combination of impairments that significantly limits your physical or mental ability to do basic work activities, we will find that you are not disabled. If you do, we will go on to step 3.

3. Do you have an impairment(s) that meets or medically equals the severity of an impairment in the listings? If you do, and the impairment(s) meets the duration requirement, we will find that you are disabled. If you do not, we will go on to step 4.

4. Do you have the residual functional capacity (RFC) to do your past relevant work? If you do, we will find that you are not disabled. If you do not, we will go on to step 5.

5. Does your impairment(s) prevent you from doing any other work that exists in significant numbers in the national economy, considering your RFC, age, education, and work experience? If it does, and it meets the duration requirement, we will find that you are disabled. If it does not, we will find that you are not disabled.

We use a different sequential evaluation process for children who apply for payments based on disability under title XVI of the Act. We describe that sequential evaluation process in § 416.924 of our regulations. If you are already receiving benefits, we also use a different sequential evaluation process when we decide whether your disability continues. See §§ 404.1594, 416.994, and 416.994a of our regulations. However, all of the processes include steps at which we consider whether your impairment(s) meets or medically equals one of our listings.

What are the listings?

The listings are examples of impairments that we consider severe enough to prevent you as an adult from doing any gainful activity. If you are a child seeking SSI payments based on disability, the listings describe

impairments that we consider severe enough to result in marked and severe functional limitations. Although the listings are contained only in appendix 1 to subpart P of part 404 of our regulations, we incorporate them by reference in the SSI program in § 416.925 of our regulations and apply them to claims under both title II and title XVI of the Act.

How do we use the listings?

The listings are in two parts. There are listings for adults (part A) and for children (part B). If you are an individual age 18 or over, we apply the listings in part A when we assess your claim, and we never use the listings in part B.

If you are an individual under age 18, we first use the criteria in part B of the listings. Part B contains criteria that apply only to individuals who are under age 18. If the criteria in part B do not apply, we may use the criteria in part A when those criteria give appropriate consideration to the effects of the impairment(s) in children. (See §§ 404.1525 and 416.925.)

If your impairment(s) does not meet any listing, we will also consider whether it medically equals any listing; that is, whether it is as medically severe as an impairment in the listings. (See §§ 404.1526 and 416.926.)

What if you do not have an impairment(s) that meets or medically equals a listing?

We use the listings only to decide that you are disabled or that you are still disabled. We will not deny your claim or decide that you no longer qualify for benefits because your impairment(s) does not meet or medically equal a listing. If you have a severe impairment(s) that does not meet or medically equal any listing, we may still find you disabled based on other rules in the ''sequential evaluation process.'' Likewise, we will not decide that your disability has ended only because your impairment(s) no longer meets or medically equals a listing.

Also, when we conduct reviews to determine whether your disability continues, we will not find that your disability has ended because we have changed a listing. Our regulations explain that, when we change our listings, we continue to use our prior listings when we review your case, if you qualified for disability benefits or SSI payments based on our determination or decision that your impairment(s) met or medically equaled a listing. In these cases, we determine whether you have experienced medical improvement and, if so, whether the medical improvement is related to the ability to work. If your condition has medically improved so that you no longer meet or medically equal the prior listing, we evaluate your case further to determine whether you are currently disabled. We may find that you are currently disabled, depending on the full circumstances of your case. See §§ 404.1594(c)(3)(i) and 416.994(b)(2)(iv)(A). If you are a child who is eligible for SSI payments, we follow a similar rule when we decide that you have experienced medical improvement in your condition. See § 416.994a(b)(2).

Why are we revising the listings for immune system disorders?

We are making these revisions to update the medical criteria in the listings and to provide more information about how we evaluate immune system disorders. We first published these rules in 1993 (58 FR 36008). At that time, we established body system listings for immune system disorders in part A and part B. We made those rules effective for 5 years from the date of publication, unless we extended them, or revised and issued them again (58 FR at 36051). Since that time, we have extended the expiration date of the immune body system listings but we have not comprehensively revised them.

We have, however, made several changes to these listings over the years. On November 19, 2001, we published final rules in the **Federal Register** adding listings 14.09 and 114.09, for inflammatory arthritis, to the immune system listings, and adding introductory text for those listings in sections 14.00B6 and 114.00E (66 FR 58009). We published minor technical changes to the immune system listings on February 24, 2002 (67 FR 20018).

How did we develop these final rules?

These final rules reflect our adjudicative experience and advances in medical knowledge, treatment, and methods of evaluating immune system disorders. They also reflect comments on the NPRM we published in 2006.

Before we developed the NPRM, we published an Advance Notice of Proposed Rulemaking (ANPRM) in the **Federal Register** on May 9, 2003 (68 FR 24896). The purpose of the ANPRM was to inform the public that we were planning to update and revise the rules we use to evaluate immune system disorders and to invite interested individuals and organizations to send us comments and suggestions for updating and revising the immune system listings. In the ANPRM, we provided a 60-day period for comments and suggestions; that period ended on July 8, 2003. We received over 200 letters and e-mails in response to the notice, many from individuals who have immune system disorders or who have family members with such disorders. We also received comments from medical experts, advocates, and people who adjudicate claims for us. Although we are not summarizing or responding to the ANPRM comments in these final rules, we read and considered them carefully.

We also hosted policy conferences on ''Immune System Disorders in the Disability Programs'' in Philadelphia, PA, on December 15, 2003, and in San Francisco, CA, on February 18 and 19, 2004. At these conferences, we heard comments and suggestions for updating and revising these rules from individuals who have immune system disorders and their family members, physicians who treat individuals with immune system disorders, other professionals who work with people who have immune system disorders, advocates who represent individuals with immune system disorders, and individuals who make disability determinations and decisions for us in the State agencies and the Office of Disability Adjudication and Review (formerly called the Office of Hearings and Appeals).

As already noted, these final rules also reflect comments we asked you to provide on the NPRM. We summarize and respond to those comments later in this preamble. Throughout this preamble, we refer to ''public comments on the NPRM'' whenever we refer to these comments to distinguish them from public comments we received on the ANPRM and at the outreach meetings.

What do we mean by ''final rules'' and ''prior rules''?

Even though these rules will not go into effect until 90 days after publication of this notice, for clarity, we refer to the changes we are making here as the ''final rules'' and to the rules that will be changed by these final rules as the ''prior rules.''

When will we start to use these final rules?

We will start to use these final rules on their effective date. We will continue to use our prior rules until the effective date of these final rules. When these final rules become effective, we will apply them to new applications filed on or after the effective date of these rules and to claims pending before us, as we describe below.

As is our usual practice when we make changes to our regulations, we will apply these final rules on or after their effective date whenever we make a determination or decision, including in those claims in which we make a determination or decision after a remand to us from a Federal court. With respect to claims in which we have made a final decision and that are pending judicial review in Federal court, we expect that the court would review the Commissioner's final decision in accordance with the rules in effect at the time the final decision of the Commissioner was issued. If a court reverses the Commissioner's final decision and remands the case for further administrative proceedings after the effective date of these final rules, we will apply the provisions of these final rules to the entire period at issue in the claim in our new decision issued pursuant to the court's remand.

How long will these final rules be effective?

These final rules will no longer be effective 8 years after the date on which they become effective, unless we extend them or revise and issue them again. However, we intend to monitor these rules, and if needed, will update the criteria for any impairment in these rules before the end of the 8-year period.

What revisions are we making with these final rules?

We are revising the prior rules to:

- Expand, reorganize, and update the introductory text in final 14.00 and 114.00 to provide more guidance for our adjudicators, and to reflect the revised listings.
- Add paragraph headings to the introductory text in final 14.00 and 114.00 for easier reference.
- Add final 14.00C and 114.00C to explain the meaning of key terms.
- Remove all reference listings. Reference listings are listings that are met by satisfying the criteria of another listing. For example, prior listing 14.08G1 for human immunodeficiency virus (HIV) infection with anemia was a reference listing that required evaluation under current listing 7.02 for chronic anemia. Therefore, prior listing 14.08G1 was redundant. In some cases, instead of using reference listings, we provide general guidance in the introductory text for the immune system disorders listings (final 14.00J2g) stating that impairments in other body systems that result from immune system disorders should be evaluated under the criteria of the affected body system. In other cases, we are replacing reference listings with specific listing criteria that are appropriate for evaluation under this body system. For example, prior listing 14.06, for undifferentiated connective tissue disorders, was entirely a reference listing. In the final rules, we are replacing the reference listing criterion with criteria that are specific to these disorders.
- Add final listings 14.10 and 114.10 for evaluating Sjögren's syndrome.
- Add functional criteria to the listings, similar to those in prior HIV infection listings 14.08N and 114.08O, for each of the other listed immune system disorders (for example, systemic lupus erythematosus and systemic vasculitis).
- Make nonsubstantive editorial changes to update the medical terminology in the introductory text and the listings and to make their language simpler and clearer.

How are we changing the introductory text for the immune system disorders listings for adults?

We are expanding and reorganizing the introductory text for these listings. There were four major sections in prior 14.00, and the longest of those sections, 14.00D, addressed only the evaluation of HIV infection. In these final rules, we are adding more sections and expanding the guidance we provide about evaluating other kinds of immune system disorders.

Some of the guidance in prior 14.00D was useful for evaluating other kinds of immune system disorders in addition to HIV infection. Therefore, we are moving that guidance from prior 14.00D to new sections that have more general applicability to immune system disorders. We are not removing any substantive guidance about how we evaluate HIV infection, only reorganizing some of the information that was in 14.00D of the prior rules and giving it broader applicability where appropriate. We are also updating and expanding some of the guidance for evaluating HIV infection and its effects that was in the prior rules, as we describe in more detail below.

The four sections in the prior rules were:

- Prior 14.00A, a short paragraph that described generally the kinds of disorders we include in this body system.
- Prior 14.00B, a lengthy section that discussed the evaluation of connective tissue disorders; that is, autoimmune disorders. It included six undesignated paragraphs that primarily explained the kinds of evidence we need to document the existence and severity of these disorders, including how we evaluate loss of function. These paragraphs were followed by six numbered sections that provided guidance about specific impairments in the listings.
- Prior 14.00C, a single sentence that explained that we evaluate allergic disorders under the appropriate listing of the affected body system.
- Prior 14.00D, a lengthy section that explained how we documented the existence and severity of HIV infection, including how we evaluated loss of function under prior listing 14.08N. It included eight numbered subsections and many paragraphs that were not designated with letters or numbers within those subsections.

In the final rules, there are 10 sections in the introductory text. The first three sections (final 14.00A, B, and C) provide general information about this body system, including definitions of terms. Each of the next three sections describes a particular category or type of immune system disorder: Autoimmune disorders (final 14.00D); immune deficiency disorders, excluding HIV infection (final 14.00E); and HIV infection (final 14.00F). The next three sections explain how we consider the effects of your treatment (final 14.00G), your symptoms (final 14.00H), and the functional limitations from your immune system disorder under these listings (final 14.00I). The last section, final 14.00J, explains how we consider the effects of your immune system disorder when it does not meet the requirements of one of the immune system disorders listings. We are designating all paragraphs in the final rules with letters or numbers for easier reference. We are also providing headings for all of the major sections and many of the subsections.

The following are the names of the major sections in final 14.00. We describe each section in detail later in this preamble.

- Final 14.00A: *What disorders do we evaluate under the immune system disorders listings?*
- Final 14.00B: *What information do we need to show that you have an immune system disorder?*
- Final 14.00C: *Definitions*
- Final 14.00D: *How do we document and evaluate the listed autoimmune disorders?*
- Final 14.00E: *How do we document and evaluate immune deficiency disorders, excluding HIV infection?*
- Final 14.00F: *How do we document and evaluate human immunodeficiency virus (HIV) infection?*
- Final 14.00G: *How do we consider the effects of treatment in evaluating your autoimmune disorder, immune deficiency disorder, or HIV infection?*

• Final 14.00H: *How do we consider your symptoms, including your pain, severe fatigue, and malaise?*
• Final 14.00I: *How do we use the functional criteria in these listings?*
• Final 14.00J: *How do we evaluate your immune system disorder when it does not meet one of these listings?*

The following is a detailed description of the changes in the introductory text.

14.00 Immune System Disorders

We are changing the name of this body system from ''Immune System'' to ''Immune System Disorders'' to more accurately reflect that we use these listings to evaluate immune system disorders in accordance with the requirements of the disability program.

Final 14.00A—What disorders do we evaluate under the immune system disorders listings?

In final 14.00A, we provide a brief overview of this body system. We explain the kinds of disorders we evaluate under the immune system disorders listings and that we organize these impairments under the categories of ''autoimmune disorders,'' ''immune deficiency disorders, excluding HIV infection,'' and ''HIV infection.'' Final 14.00A has four subsections.

We incorporate prior 14.00A in the opening sentence of final 14.00A1. We are revising the sentence, which explains the kinds of immune system dysfunction that immune system disorders may cause, to update and simplify it. In final 14.00A1a and 14.00A1b, we incorporate the first sentence in the sixth paragraph of prior 14.00B to explain that immune system disorders can cause dysfunction in one or more components of the immune system, and describe ways in which immune system disorders may result in loss of function. In the third sentence of final 14.00A1b, we are adding ''involuntary'' as a descriptor of weight loss to clarify that we mean weight loss due to an immune system disorder(s) or its treatment. We are adding ''involuntary'' as a descriptor of weight loss throughout the introductory text in part A and part B for this same reason. Final 14.00A1c is a new paragraph that explains how we have organized the discussions of immune system disorders in the introductory text for these listings.

In final 14.00A2, *Autoimmune disorders,* we incorporate the first paragraph in prior 14.00B to provide a brief description of autoimmune disorders. We are adding an explanation that these disorders are sometimes referred to as ''rheumatic diseases,'' ''connective tissue disorders,'' or ''collagen vascular disorders,'' and that some of the features of these disorders in adults differ from the features of the same disorders in children. We provide a cross-reference to final 14.00D, the section of the introductory text that addresses autoimmune disorders in detail. We are also removing the last sentence of the first paragraph of prior 14.00B, which explained that connective tissue disorders generally evolve and persist over time, may result in functional loss, and may require long-term, repeated evaluation and management, because it did not provide useful adjudicative guidance. However, we do explain in final 14.00A1b that immune system disorders can cause ''extreme'' loss of function. We also explain parenthetically that ''extreme'' means ''very serious'' to make clear that we use the term ''extreme'' in the same way that we use it in other body systems; for example, see 1.00B2b1 and 1.00B2c in the musculoskeletal system.

Final 14.00A3, *Immune deficiency disorders, excluding HIV infection,* is new. We explain that these disorders can be classified as ''primary'' or ''acquired,'' are characterized by recurrent or unusual infections, and are associated with an increased risk of malignancies and of other autoimmune disorders. We also provide a cross-reference to final 14.00E, the section of the introductory text that addresses immune deficiency disorders in detail.

In final 14.00A4, *Human immunodeficiency virus (HIV) infection,* we provide a brief description of HIV infection. As in the NPRM, we include the first sentence from prior 14.00D1 in this section. However, in an editorial change from the prior rules and the NPRM, we have deleted the statement in the sentence that HIV infection is ''caused by a specific retrovirus.'' The change is not substantive, but only clarifies and updates our rules. It is now known that there are several forms of human immunodeficiency virus, therefore our statement that HIV infection is caused by ''a specific'' virus could be misleading. Also, since the ''V'' in the abbreviation ''HIV'' stands for ''virus,'' the sentence in the prior rules did not need to state that human immunodeficiency virus infection is caused by a virus. We have retained the rest of the sentence, which explains that HIV infection may be characterized by increased susceptibility to opportunistic infections, cancers, or other conditions. We also provide a cross-reference to final 14.00F, the section of the introductory text that addresses HIV infection in detail.

Final 14.00B—What information do we need to show that you have an immune system disorder?

In final 14.00B, we incorporate the first sentence of the second paragraph of prior 14.00B to explain what information we need to show that you have an immune system disorder. We moved the second and third sentences of the second paragraph of prior 14.00B, which define our term ''appropriate medically acceptable imaging,'' to final 14.00C, a new section that provides definitions of terms in these listings. We are removing the last two sentences of the prior paragraph, which explained that we would not purchase tests that may involve significant risk. Since we already include this general policy in §§ 404.1519m and 416.919m of our regulations, it is not necessary to repeat it in this section. However, as we explain below, we are including guidance about the purchase of certain tests in other sections of these final rules.

In the second sentence of final 14.00B, we provide that ''we will make every reasonable effort'' to obtain your medical history, medical findings, and the results of laboratory tests in documenting whether you have an immune system disorder. We included this requirement in prior 14.00D for HIV infection, but we did not include similar guidance in prior 14.00B for connective tissue disorders. We are adding this guidance under final 14.00B because it is appropriate for all immune system disorders.

We also are removing the third and fourth paragraphs of prior 14.00B. The third paragraph of prior 14.00B provided that we need a longitudinal clinical record of at least 3 months demonstrating active disease to assess the severity and duration of your impairment. This was not always the case, even under the prior rules. For example, individuals with HIV infection and cryptococcal meningitis (prior and final listing 14.08B4) or Kaposi's sarcoma (prior and final listing 14.08E2), and individuals with ankylosing spondylitis with fixation (ankylosis) of the dorsolumbar spine at 45° (prior listing 14.09B2, final listing 14.09C1) are disabled based on those findings alone. In these cases, we do not need 3 months of evidence or evidence showing active disease. Other cases may be decided with less than 3 months of evidence, while others may require more than 3 months of evidence. Therefore, we are removing this guidance because we must decide each case on an individual basis.

Final 14.00C—Definitions

In final 14.00C, we define what we mean by important terms in these listings. As already noted, we include the definition of ''appropriate medically acceptable imaging'' from the second paragraph of prior 14.00B. However, in an editorial change from the NPRM, we are revising the definition of ''appropriate'' imaging from ''one that is generally accepted and consistent with the prevailing state of medical knowledge and clinical practice'' to ''the proper one to support the evaluation and diagnosis of the impairment'' to be consistent with the language used in other body system listings, for example, the musculoskeletal body system (see 1.00C1) and hematological disorders body system (see 7.00B). We are also including in this new section the definitions of the terms ''severe'' from the sixth paragraph of prior 14.00B, ''inability to ambulate effectively'' and ''inability to perform fine and gross movements effectively'' from prior 14.00B6b, and ''resistant to treatment,'' ''recurrent,'' and ''disseminated'' from the second, third, and fourth paragraphs of prior 14.00D2. All of these terms apply to several, and sometimes all, of the final listings in this body system.

In final 14.00C, we do not include the phrase ''must have lasted, or be expected to last, for at least 12 months'' from the definitions of ''inability to ambulate effectively'' and ''inability to perform fine and gross movements effectively'' that was in prior 14.00B6b because we believe it is unnecessary. Unless an impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months to meet the definition of disability. This change also makes the definitions of the terms consistent with the definitions of the same terms in 1.00B2b and 1.00B2c in the musculoskeletal body system.

We are also including, but simplifying, the definitions of the terms ''resistant to treatment,'' ''recurrent,'' and ''disseminated'' that were in prior 14.00D2, primarily to remove language that we believe was unnecessary. For example, we removed the explanation that the terms ''have the same general meaning as used by the medical community.'' These changes are editorial only, and the final definitions are not substantively different from the prior rules.

In final 14.00C2, we are adding the definitions of several other important terms in these listings, including the term ''constitutional symptoms or signs.'' We are revising this definition slightly in response to a public comment on the NPRM to indicate that for purposes of these listings the constitutional symptoms or signs are severe fatigue, fever, malaise, and involuntary weight loss. In the proposed rules, we inadvertently referred to ''fatigue'' in our definition of constitutional symptoms or signs, rather than ''severe fatigue.'' We did, however, include a separate definition for ''severe fatigue'' because it is the criterion we use in all of the listings that include criteria for constitutional symptoms or signs. The change in the definition we are making in these final rules makes no substantive difference to the application of the listings, makes this definition consistent with the criteria of the listings, and more accurately reflects our intent.

As in the NPRM, we are also providing a definition for the term ''malaise.'' We are adding the definitions for severe fatigue and malaise in response to the many comments we received before we developed the proposed rules that indicated that the fatigue and malaise that people who have immune system disorders experience can be very limiting.

In final 14.00C8, we reference current 1.00F for the definition of ''major peripheral joints'' instead of restating the definition as we did in prior 14.00B6a.

In final 14.00C12, we change ''describes'' to ''means.'' This is an editorial change from the NPRM for consistency with the other definitions in this section.

Final 14.00D—How do we document and evaluate the listed autoimmune disorders?

We are changing the heading of proposed 14.00D in response to a public comment on the NPRM that we describe in the public comments section of this preamble. In final 14.00D, we are incorporating and expanding upon the information in prior 14.00B1 through 14.00B6, which described features commonly associated with each of the listed autoimmune system disorders. Throughout these sections, we refer to ''autoimmune disorders'' instead of ''connective tissue disorders'' because the phrase ''autoimmune disorders'' is more medically accurate and more frequently used by medical professionals. We are also adding section 14.00D7 for Sjögren's syndrome because we are adding listing 14.10 for that autoimmune disorder.

In final 14.00D1, *Systemic lupus erythematosus (14.02),* we expand and clarify the information in prior 14.00B1. In final 14.00D1a, *General,* we explain that systemic lupus erythematosus (SLE) may involve any organ or body system and describe by body system some potential manifestations of SLE. We expand our explanation of how SLE is frequently characterized clinically. We are changing the reference to ''fatigability'' used in prior 14.00B1 to ''severe fatigue'' to be consistent with how we describe the constitutional symptoms throughout the final immune system disorders listings. We are also adding ''involuntary'' as a descriptor of weight loss to clarify that we mean weight loss due to SLE or its treatment, and to be consistent with our addition of this word throughout the introductory text and listings, as we have already explained.

In final 14.00D1b, *Documentation of SLE,* we are updating our rules to explain that your medical evidence will generally, but not always, show that your SLE satisfies the criteria in the ''Criteria for the Classification of Systemic Lupus Erythematosus'' by the American College of Rheumatology, found in the most recent edition of the *Primer on the Rheumatic Diseases* published by the Arthritis Foundation. This is a more up-to-date reference than the 1982 reference in the prior rules.

In final 14.00D2, *Systemic vasculitis (14.03),* we clarify the information in the prior rule. Final 14.00D2a, *General,* corresponds to the first three sentences of prior 14.00B2. In it, we explain what vasculitis is, and that it may be associated with other autoimmune disorders. We also give examples of several clinical patterns in which it may occur. We are removing the fourth sentence of prior 14.00B2, which described cutaneous vasculitis, because the impairment varies greatly in its manifestation, may not be associated with systemic involvement, and would not be expected to result in a listing-level impairment.

Final 14.00D2b, *Documentation of systemic vasculitis,* corresponds to the last two sentences of prior 14.00B2. In it, we describe the documentation that is used to confirm the diagnosis of systemic vasculitis. In response to a comment described later in this preamble, we are expanding the guidance we provide in this section to explain that we will make ''every reasonable effort'' to obtain reports of angiography or tissue biopsy when they are part of your medical records. However, we will not purchase these invasive and costly procedures.

Final 14.00D3, *Systemic sclerosis (scleroderma) (14.04),* corresponds to prior 14.00B3. We are revising the heading and expanding the information that was in the prior section. Final

14.00D3a, *General,* corresponds to the first three sentences of prior 14.00B3. We are changing the term ''Raynaud's phenomena,'' which we used in the second and third sentences of prior 14.00B3, to ''Raynaud's phenomenon'' because the latter is the correct term. We make this same change in final listing 14.04C. In final 14.00D3b, *Diffuse cutaneous systemic sclerosis,* we continue to explain that, in addition to skin or blood vessels, major organ or systemic involvement may include the gastrointestinal tract, lungs, heart, kidneys, and muscle. This guidance corresponds to the fourth sentence in prior 14.00B3.

Final 14.00D3c, *Localized scleroderma (linear scleroderma or morphea),* is new. We are adding this section and appropriate listings in final 14.04 for these disorders that originate in childhood because their disabling effects can persist into adulthood. Final 14.00D3c is essentially the same as final 114.00D3c, which we describe in detail later in this preamble. We are also making minor editorial changes from the language we proposed in the NPRM for clarity.

Final 14.00D3d, *Documentation of systemic sclerosis (scleroderma),* is also new. In it, we explain what documenting systemic sclerosis (scleroderma) involves and that there may be an overlap with other autoimmune disorders.

In final 14.00D4, *Polymyositis and dermatomyositis (14.05),* we clarify the information in prior 14.00B4. Final 14.00D4a, *General,* corresponds to the first three sentences of prior 14.00B4. It describes the characteristics of polymyositis and dermatomyositis. In the final rule, we have made minor editorial changes from the language we proposed in the NPRM.

In final 14.00D4b, *Documentation of polymyositis or dermatomyositis,* we describe the findings that are generally used to document these impairments. The first sentence of the final rule corresponds to the last sentence of prior 14.00B4. We are making minor editorial revisions to the prior rules, including the removal of the reference to ''myositis,'' because there are multiple characteristic abnormalities on muscle biopsy that support the diagnosis of polymyositis or dermatomyositis. We also are adding a sentence to explain that people with dermatomyositis have characteristic skin findings. In response to a comment described later in this preamble, we are expanding the guidance we provide in this section to explain that we will make ''every reasonable effort'' to obtain reports of electromyography or muscle biopsy when they are part of your medical records. However, we will not purchase these procedures.

In final 14.00D4c, *Additional information about how we evaluate polymyositis and dermatomyositis under the listings,* we explain how we evaluate commonly occurring limitations associated with these disorders. Final 14.00D4c(i) corresponds to the fourth and fifth sentences of prior 14.00B4. We are deleting the example of weakness of the anterior neck flexor muscles in the sixth sentence of prior 14.00B4 because we are deleting the reference to the cervical muscles from listing 14.05 for reasons we explain later in this preamble. We are adding an example of rising independently from a squatting position because this is a common means for evaluating weakness in the pelvic girdle muscles.

In final 14.00D4c(ii), we explain that we will evaluate malignancies (which may be associated with these disorders) under the malignant neoplastic diseases listings (13.00). (We do not provide this guidance in final 114.00D4c in the part B (childhood) section for polymyositis or dermatomyositis because malignancies are not commonly associated with these disorders in children.) We also explain that we evaluate the involvement of other organs or body systems under the affected body system.

In final 14.00D5, *Undifferentiated and mixed connective tissue disease (14.06),* we reorganize and clarify the information from prior 14.00B5. In the final rules, we are adding an explicit reference to mixed connective tissue disease (MCTD) to clarify what we meant in the prior rules when we referred to ''overlap'' syndromes. This is not a substantive change, but a clarification of our prior rules to update medical terminology. In final 14.00D5a, *General,* we describe what we mean by undifferentiated and mixed connective tissue disease. In final 14.00D5b, *Documentation of undifferentiated and mixed connective tissue disease,* we explain when clinical features and serologic findings may be used to diagnose undifferentiated and mixed connective tissue disease. These provisions in final 14.00D5a and 14.00D5b are not substantively different from the provisions in the first three sentences of prior 14.00B5.

We are removing the last sentence of prior 14.00B5. The sentence indicated that the correct designation of an ''overlap'' disorder is important for the assessment of prognosis. While the correct designation of an ''overlap'' disorder is useful in treatment settings, in our experience the requirement in our prior rules was not useful for adjudication.

In final 14.00D6, *Inflammatory arthritis (14.09),* we expand, reorganize, and clarify the rules in prior 14.00B6. Throughout final 14.00D6, we are simplifying the language of the NPRM, in which we used the rarely encountered word ''arthritides''; that is, the plural form of ''arthritis.'' Instead, we use the terms ''arthritis,'' and in final 14.00D6a, ''the spectrum of inflammatory arthritis.''

Final 14.00D6a, *General,* corresponds to the first and fourth sentences of prior 14.00B6. We continue to explain that inflammatory arthritis includes a vast array of disorders that differ in cause, course, and outcome, and that may result in difficulties with ambulation or fine and gross movements. We edited the fourth sentence of prior 14.00B6 to break it into three shorter sentences. However, we did not change the meaning of the provision. In addition to changing the term ''arthritides'' from the NPRM, we also made minor editorial changes in the final paragraph for clarity.

Final 14.00D6b, *Inflammatory arthritis involving the axial spine (spondyloarthropathy),* and final 14.00D6c, *Inflammatory arthritis involving the peripheral joints,* correspond to the second and third sentences of prior 14.00B6. In these sections, we list some disorders that may be associated with inflammatory arthritis involving the axial spine (final 14.00D6b) and inflammatory arthritis affecting the peripheral joints (final 14.00D6c). We are including inflammatory bowel disease (IBD) in the lists of examples of specific disorders in these sections because arthritis is the most common extra-intestinal complication of IBD. In final 14.00D6b, we are not including the examples of ''other reactive arthropathies'' and ''undifferentiated spondylitis,'' which were in the second sentence of prior 14.00D6, because they are non-specific and we do not intend to provide a complete list, only some examples. Finally, we are updating some of the terminology in this section. For example, we refer to ''psoriatic arthritis'' instead of ''psoriatic arthropathy.''

Final 14.00D6d, *Documentation of inflammatory arthritis,* is new. In it, we explain that generally, but not always, the diagnosis of inflammatory arthritis is based on the clinical features and serologic findings described in the most recent edition of the *Primer on the Rheumatic Diseases.*

Final 14.00D6e, *How we evaluate inflammatory arthritis under the listings,* corresponds to the information

in the last two sentences of prior 14.00B6, prior 14.00B6c, and prior 14.00B6d. We are reorganizing the text to reflect the reorganization of listing 14.09, which we explain later in this preamble, and to clarify it. We are also making changes to 14.00D6e in response to a public comment on the NPRM, as explained below and in the public comments section of this preamble.

- Final 14.00D6e(i) explains that final listings 14.09A and 14.09C1 (prior listings 14.09A and 14.09B) are met by showing an impairment that results in an ''extreme'' limitation. This is how we describe ''inability to ambulate effectively'' in 1.00B2b in our musculoskeletal listings and, therefore, it is only a clarification of the prior rule. In the final rule, we retain the provision from prior 14.00B6c that the inability to ambulate effectively is implicit in final listing 14.09C1 (prior listing 14.09B), the listing for ankylosis of the spine with fixation at a 45° angle, even though individuals who have the degree of ankylosis described in the listing ordinarily do not require the use of bilateral upper limb assistance.

A public commenter on the NPRM pointed out that proposed (and prior) listing 14.09 did not account for individuals who are unable to ambulate effectively because of involvement of a major peripheral joint in one lower extremity, requiring our adjudicators to refer to listings 1.02 and 1.03 in those cases. In response to this comment, we decided to simplify our rules so that there is no longer a need to cross-refer to the listings in the musculoskeletal system. We revised listing 14.09 (and listing 114.09) so that all individuals with inflammatory arthritis who are unable to ambulate effectively or to use their upper extremities effectively can qualify under the inflammatory arthritis listing. As a consequence, we revised this section to reflect the revised listing criteria. We also removed proposed 14.00D6e(iv) and 14.00D6e(v) as explained below. (For clarity, we are also revising a sentence in 1.00B1 and 101.00B1 in the musculoskeletal system listings. We describe this and the public comment that led to these changes in the public comments section of this preamble.)

- Final 14.00D6e(ii) explains final listings 14.09B (prior listing 14.09D), 14.09C2 (prior listing 14.09E), and 14.09D. We revised the language in the NPRM to more clearly explain that listing-level severity can result from various combinations of complications from inflammatory arthritis. This is not a substantive change, only a clarification. In this section, we also incorporate the provision in the first sentence of prior 14.00B6d that extra-articular impairments may meet listings in other body systems.
- Final 14.00D6e(iii) corresponds to the third and fourth sentences of prior 14.00B6d. It explains that extra-articular features of inflammatory arthritis may involve any body system and lists examples of commonly occurring extra-articular impairments by body system. We are reorganizing and expanding the list of examples of such impairments from the prior rules and clarifying the body systems to which they belong. We are also making a minor editorial change to the sentence we proposed. In the NPRM, we introduced the list of examples with the statement ''Commonly occurring extra-articular impairments include * * *.'' However, the list that followed was actually a list of body systems, each of which contained parenthetical examples of specific impairments. In the final rules, we are providing a more accurate introduction to the list of examples of body systems and their parenthetical examples.
- As indicated above, we removed proposed 14.00D6e(iv) and 14.00D6e(v) in response to a public comment. These sections corresponded to the last sentence of prior 14.00B6, which explained that we used listing 1.02 or 1.03 in the musculoskeletal system when the dominant feature of the impairment was persistent deformity without ongoing inflammation or when there had been surgical reconstruction.
- Final 14.00D6e(iv) (proposed 14.00D6e(vi)) clarifies that we evaluate your impairment under any appropriate listing when you have both inflammation and chronic deformities.

We are not including the provisions of prior 14.00B6e in these final rules. Prior 14.00B6e provided that the fact that an individual is dependent on steroids, or any other drug, for the control of inflammatory arthritis is insufficient in itself to establish disability. We added it to part A of our listings in 2002 for consistency with 114.00E6, a provision we added to part B of the listings at the same time (66 FR at 58020 (2001)). We are removing that provision for reasons we explain below in our summary of the final rules in part B. Therefore, we are removing this provision in part A for consistency with that change. However, in final 14.00G3, we continue to state that we will consider the adverse side effects of treatment, including the adverse effects of corticosteroids, to ensure that our adjudicators consider the side effects an individual might experience from steroids and any other treatment.

Final 14.00D7, *Sjögren's syndrome (14.10),* is new. As already noted, we are adding a listing for Sjögren's syndrome. In connection with that final listing, final 14.00D7a, *General,* explains the features of the disorder, including its resulting symptoms and possible complications. We also list organ systems that may be involved and note that Sjögren's syndrome may be associated with other autoimmune disorders. In final 14.00D7b, *Documentation of Sjögren's syndrome,* we also explain that if you have Sjögren's syndrome, your medical evidence will generally, but not always, show that your disease satisfies the criteria in the current ''Criteria for the Classification of Sjögren's Syndrome'' found in the most recent edition of the *Primer on the Rheumatic Diseases.*

Final 14.00E—How do we document and evaluate immune deficiency disorders, excluding HIV infection?

We changed the heading of proposed 14.00E in response to a public comment on the NPRM that we describe in the public comments section of this preamble. In final 14.00E, we add a section describing how immune deficiency disorders (excluding HIV infection) are classified, documented, and evaluated. This section has four subsections.

- In final 14.00E1, *General,* we explain that immune deficiency disorders are classified as either ''primary'' or ''acquired.'' Primary disorders are mainly seen in children but, due to recent advances in treatment, many affected children survive into adulthood.
- In final 14.00E2, *Documentation of immune deficiency disorders,* we explain that documentation of these disorders may be based on laboratory evidence or by other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice.
- In final 14.00E3, *Immune deficiency disorders treated by stem cell transplantation,* we explain how we evaluate immune deficiency disorders that are treated in this way. In final 14.00E3a, *Evaluation in the first 12 months,* we explain that if you undergo stem cell transplantation, we will consider you disabled until at least 12 months from the date of the transplant. This is the same provision that we use for most malignancies treated by bone marrow or stem cell transplants in the neoplastic listings. In 13.00L3b of the malignant neoplastic diseases body system, we also include a special provision for autologous bone marrow transplants—transplants using your own

stem cells. We do not include such an alternative provision in these final rules because people with immune deficiency disorders receive allogeneic transplants—that is, stem cells taken from other people. Also, unlike in the rules in the malignant neoplastic diseases body system, we use the phrase ''stem cell transplantation'' instead of ''bone marrow or stem cell transplantation'' in this final section and in final listing 14.07B because ''stem cell transplantation'' is a broader term that encompasses different sites for obtaining hematopoetic (blood-forming) stem cells, including bone marrow, peripheral blood, and umbilical cord blood. In final 14.00E3b, *Evaluation after the 12-month period has elapsed,* we explain that after this period has elapsed, we consider any demonstrable residuals of your immune deficiency disorder including any residual impairment(s) resulting from your treatment. The provision is based on 13.00L4 in our malignant neoplastic diseases listings.

• In final 14.00E4, *Medication-induced immune suppression,* we explain that medication can result in immune suppression that will usually resolve once the medication is ceased. However, if you take prescribed medications for long-term immune suppression, such as after an organ transplant, we will look at the frequency and severity of any infections you get, residuals from the organ transplant itself, and whether there has been any significant deterioration of other organ systems.

Final 14.00F—How do we document and evaluate human immunodeficiency virus (HIV) infection?

We changed the heading of proposed 14.00F in response to a public comment on the NPRM that we describe in the public comments section of this preamble. In final 14.00F, we incorporate, update, and expand information on HIV infection that was contained in prior 14.00D3 through 14.00D7. We also make nonsubstantive editorial changes.

As already noted, we moved the first sentence of prior 14.00D1 to final 14.00A4. Therefore, we begin final 14.00F with the second sentence of prior 14.00D1. It is a reminder that an individual's HIV infection need not meet the Centers for Disease Control and Prevention (CDC) definition of acquired immune deficiency syndrome (AIDS) to meet or medically equal the criteria of listing 14.08. We made minor editorial changes to the sentence, but did not change its meaning.

We do not require an individual's HIV infection to meet the CDC definition of AIDS because in evaluating disability claims, our concern is to determine whether an individual's impairment(s) is severe enough to prevent him or her from engaging in any substantial gainful activity. The CDC's definition is designed to enhance its capability for activities such as disease reporting and surveillance, epidemiologic studies, prevention and control activities, and public health policy and planning. This definition is not intended to determine whether any statutory or regulatory requirements for disability are met.

We moved the provisions of prior 14.00D2 to other sections in the final rules. In the first four paragraphs of prior 14.00D2, we defined the terms ''resistant to treatment,'' ''recurrent,'' and ''disseminated,'' and we now define those terms in final 14.00C. In the fifth paragraph of prior 14.00D2, we defined ''significant involuntary weight loss'' for purposes of prior listing 14.08I (final listing 14.08H). In the final rules, we include this definition in 14.00F5.

Like prior 14.00D3, final 14.00F1 is in two major sections: A section explaining how we document the diagnosis of HIV infection definitively (14.00F1a) and a section explaining how we document the diagnosis of HIV infection when we do not have definitive evidence (14.00F1b). In final 14.00F1, *Documentation of HIV infection,* we incorporate and update the information in prior 14.00D3 to explain the laboratory tests or other evidence we accept as documentation of HIV infection. In response to a public comment on the NPRM, we have also added a statement, similar to the statements we added in final 14.00D2b and 14.00D4b, explaining that we will not purchase laboratory testing to establish whether you have HIV infection.

Final 14.00F1a, *Definitive documentation of HIV infection,* corresponds to prior 14.00D3a. We updated and expanded this section to include newer laboratory diagnostic techniques that did not exist or were not widely used when we published the prior rules in 1993.

• Final 14.00F1a(i), for HIV antibody tests, corresponds to prior 14.00D3a(i). We made only nonsubstantive editorial changes.

• Final 14.00F1a(ii) is new from our prior rules. It adds positive ''viral load'' tests for HIV infection, such as quantitative plasma HIV RNA, quantitative plasma HIV branched DNA, and reverse transcriptase-polymerase chain reaction (RT–PCR), that were not widely available when we published the prior rules.

• Final 14.00F1a(iii) is for HIV DNA detection by polymerase chain reaction (PCR). We included it as an example of an ''other test'' in prior 14.00D3a(iii) because it was not widely available when we published the prior rules.

• Final 14.00F1a(iv), for HIV antigen, corresponds to prior 14.00D3a(ii).

• Final 14.00F1a(v) is new from our prior rules. It adds a positive viral culture for HIV from peripheral blood mononuclear cells (PBMC) as another test that definitively documents HIV infection. Even though it is not commonly used, we will accept it as definitive evidence if it is in your medical records.

• Final 14.00F1a(vi), for other tests that are highly specific for detection of HIV, corresponds to the first paragraph in prior 14.00D3a(iii).

Final 14.00F1b, *Other acceptable documentation of HIV infection,* corresponds to prior 14.00D3b. It explains what documentation of HIV infection we will accept instead of definitive laboratory testing. The final rule is essentially the same as the prior rule except for nonsubstantive editorial changes. However, in response to a public comment on the NPRM, we removed the word ''*carinii*'' and refer now only to ''*Pneumocystis pneumonia*'' (PCP) in this section and others in these final rules. We explain the reason for this change in the public comments section of this preamble.

In final 14.00F2, *CD4 tests,* we combine the provisions in the second undesignated paragraph after prior 14.00D3a(iii) and the second paragraph in prior 14.00D4a. We specify that, even though a reduced CD4 count or percent alone does not establish a definitive diagnosis of HIV infection, a count below 200/mm^3 (or below 14 percent of the total lymphocyte count) along with clinical findings does offer supportive evidence of the existence of HIV infection without a definitive diagnosis. This is because a CD4 count below 200 is an indicator of an increased susceptibility to developing opportunistic infections.

In the final rules, we slightly revised the language we proposed to correct minor inconsistencies in the NPRM. In the fourth sentence of proposed 14.00F2, we referred to a CD4 count ''below 200.'' However, in the third sentence, we referred to a CD4 count that is ''200 mm^3 or less,'' which is not precisely the same thing. In these final rules, we are correcting the third sentence to also say ''below 200'' for consistency. Likewise, we revised the parenthetical reference to ''below 14

percent'' and clarified that the reference is to the percentage of CD4 cells to the total lymphocyte count. We made the same changes throughout these final rules for consistency with these corrections. We also made nonsubstantive editorial changes in this paragraph.

In final 14.00F3, *Documentation of the manifestations of HIV infection,* we incorporate the information in prior 14.00D4 with nonsubstantive editorial changes. Like final 14.00F1 and prior 14.00D4, final 14.00F3 is divided into two main parts:

- Final 14.00F3a, *Definitive documentation of the manifestations of HIV infection,* incorporates the first paragraph in prior 14.00D4a and explains how we document manifestations of HIV infection definitively.
- Final 14.00F3b, *Other acceptable documentation of the manifestations of HIV infection,* incorporates information that was in the first paragraph of prior 14.00D4b and explains how we document manifestations of HIV infection when we do not have definitive evidence.

We are revising the language of proposed 14.00F3b to clarify our original intent. In the prior rule, we indicated that ''if no definitive laboratory evidence is available, manifestations of HIV infection may be documented by medical history, clinical and laboratory findings, and diagnosis(es) indicated in the medical evidence.'' The sentence may have implied that we needed to have all of the things listed (medical history and clinical findings and laboratory findings and diagnosis(es)) to determine that you have a manifestation of HIV infection when we do not have definitive laboratory findings. That was not our intent, so we are clarifying in the final rule that we may need only some of this information to make a finding that you have a manifestation of HIV infection, depending on the prevailing state of medical knowledge and clinical practice. We are also clarifying what we mean by ''laboratory findings'' in this context; that is, laboratory findings that do not in themselves definitively establish the existence of an HIV-related manifestation. In response to a public comment on the NPRM, we are also clarifying in final 14.00F3b that the manifestations that are listed are only examples of manifestations that can be diagnosed without definitive evidence. We will accept a presumptive diagnosis of any manifestation of HIV infection so long as the method used to make the diagnosis is consistent with the prevailing state of medical knowledge and clinical practice.

In 14.00D4 of the prior rules we provided specific guidance for documenting one particular manifestation of HIV infection without definitive evidence: *Cytomegalovirus* (CMV) disease. In final 14.00F3b, we expand the section to include three additional manifestations, including a manifestation we added in response to a public comment on the NPRM. The revised guidance is as follows:

- In final 14.00F3b(i), we explain that PCP is frequently diagnosed presumptively without definitive evidence and provide examples of evidence that is supportive of a presumptive diagnosis of PCP. Because we removed the word ''*carinii*'' in a change we made in final 14.00F1b, we no longer need the parenthetical note we proposed to include in 14.00F3b(i); therefore, we have not included it in these final rules. In response to a public comment on the NPRM, we also added ''no evidence of bacterial pneumonia'' to the list of evidence that is supportive of a presumptive diagnosis of PCP. For consistency with a change we made in final 14.00F3b(ii) in response to a public comment on the NPRM, we also indicate that supportive evidence of a presumptive diagnosis of PCP ''may'' include the items we list. This is not a change in the meaning of the proposed rule, only a clarification.
- In final 14.00F3b(ii), we incorporate and expand the information now in the second paragraph of prior 14.00D4b, regarding the documentation of CMV disease. However, in an editorial change from the NPRM, we revised the second and fourth sentences and removed the third sentence in proposed 14.00F3b(ii). In the NPRM, we stated that a serology test ''identifies a history of infection with CMV, but it does not confirm an active disease process.'' We revised this to state that a serology test ''does not establish a definitive diagnosis of CMV disease, but it does offer supportive evidence of a presumptive diagnosis of CMV disease.'' Due to this revision, we removed a positive CMV serology test from the list of examples of clinical findings that are supportive of a presumptive diagnosis of CMV that were in the fourth sentence of the proposed section, and revised the sentence to indicate that the examples provided are other clinical findings that support a presumptive diagnosis of CMV. We removed the third sentence because it was unnecessary. These changes are not substantive, only a clarification of the proposed rules. As in the NPRM, we do not include ''documentation of CMV disease requires confirmation by biopsy'' as in the last sentence of the second paragraph of prior 14.00D4b because we are providing information on documentation other than definitive laboratory findings. Also, instead of stating that we can use generally acceptable methods to confirm the diagnosis of CMV, we provide examples of evidence, such as fever and a positive CMV serology test, that is supportive of a presumptive diagnosis of CMV disease. In response to a public comment on the NPRM, we are clarifying that an individual need not have all of the findings we list by indicating that supporting evidence ''may'' include these findings.
- In final 14.00F3b(iii), we explain how toxoplasmosis of the brain is presumptively diagnosed since the definitive method of diagnosing toxoplasmosis of the brain by biopsy is not commonly performed.
- In final 14.00F3b(iv) we provide guidance about how candidiasis of the esophagus may be presumptively diagnosed. We explain our reasons for making this addition and the other changes summarized above in the public comments section of this preamble.

We are also making a minor change from the NPRM in the opening paragraph of 14.00F3. The last sentence explained that we will make every reasonable effort to obtain reports of the results of laboratory testing you have had for a manifestation of HIV infection. We are not including that sentence in final 14.00F3 because it is repetitive of other provisions in these final rules and in our other regulations. See, for example, final 14.00B and current §§ 404.1512 and 416.912. Therefore, this revision is only editorial, simplifying the proposed rule without changing any requirements.

In final 14.00F4, *HIV infection manifestations specific to women,* we incorporate the information in prior 14.00D5. In final 14.00F4a, *General,* we incorporate the first paragraph of prior 14.00D5, while in final 14.00F4b, *Additional considerations for evaluating HIV infection in women,* we incorporate the second paragraph of prior 14.00D5. Except for adding paragraph designations and headings and minor editorial changes (including changes that are reflected in the paragraph designations of the listings explained below), the final provisions are the same as in the prior rules.

In final 14.00F5, *Involuntary weight loss,* we incorporate the last paragraph of prior 14.00D2 with nonsubstantive editorial changes, including a change that reflects the redesignation of prior

listing 14.08I as final listing 14.08H. In a change from the NPRM, we are not including the first sentence we had proposed, which was also in the prior rules. The sentence said, '' '[S]ignificant involuntary weight loss' does not correspond to a specific minimum amount or percentage of weight loss.'' The sentence could have been confusing because the very next sentence (what is now the first sentence in the final rule) explains that a 10 percent weight loss is always ''significant''; therefore, in some cases ''significant weight loss'' does correspond to a specific percentage. It was also unnecessary because the next sentence (the second sentence in the final rule) explains that a weight loss of less than 10 percent may or may not be ''significant,'' which has essentially the same meaning as the sentence we removed.

Final 14.00G—How do we consider the effects of treatment in evaluating your autoimmune disorder, immune deficiency disorder, or HIV infection?

In final 14.00G, we explain how we consider the effects of treatment for all three categories of immune system disorders; that is, autoimmune disorders, immune deficiency disorders, and HIV infection. The new section addresses in one place issues of treatment that are common to all three types of immune system disorders as well as issues of treatment that are unique to each type of disorder, including treatment that is specifically for HIV infection. We did not remove any guidance about treatment for HIV infection that is still relevant, but instead we moved it to this new section. In fact, we expanded and updated our rules to reflect what has been learned in applying different treatments for HIV infection since we published the prior rules. The provisions for addressing both the positive effects and negative side effects of treatment in individuals who have autoimmune disorders and immune deficiency disorders, other than HIV infection, are new in these final listings and, we believe, provide useful adjudicative guidance that was lacking in the prior rules.

Final section 14.00G has six subsections. The first two (final 14.00G1 and 14.00G2) and the last one (final 14.00G6) are applicable to all immune system disorders. Final 14.00G3–14.00G5 provide guidance specific to each of the three main types of immune system disorders: Autoimmune disorders (final 14.00G3), immune deficiency disorders, excluding HIV infection (final 14.00G4), and HIV infection (final 14.00G5).

In final 14.00G1, *General,* we incorporate the first and fifth sentences of prior 14.00D7. We believe that this guidance has general applicability to all immune system disorders, not just HIV infection. We first explain that we consider the effectiveness of your treatment on your signs, symptoms, and laboratory findings, and the negative side effects of your treatment on your functioning. We also explain that we will make every reasonable effort to obtain a specific description of the treatment you receive. Then, we list eight factors we consider when we evaluate your treatment. They are mostly based on factors we mentioned in the prior rule, but we expanded the list, and in some cases clarified the factors that were in the prior rules. For example, instead of referring only to the ''dosage [and] frequency of administration'' of your treatment, we refer to ''the intrusiveness and complexity of your treatment (for example, dosing schedule, need for injections).'' In final 14.00G1e, we also introduce the term ''variability of your response to treatment,'' a concept we addressed for HIV infection in prior 14.00D7 but that we believe is of particular importance in considering the effects of treatment in all individuals with immune system disorders. We explain this concept in more detail in final 14.00G2.

Final 14.00G1f is new. It describes the interactive and cumulative effects of treatments for immune system disorders and other disorders that persons with immune system disorders may also have. We explain that the effects of these treatments taken together may be greater than they would be if we considered them separately, and we provide an example of treatment for HIV infection together with treatment for hepatitis C. Final 14.00G1g is also new. It explains that we will also consider the duration of your treatment. Final 14.00G1h is a catchall for other relevant factors we have not listed in 14.00G1a–14.00G1g.

In final 14.00G2, *Variability of your response to treatment,* we explain what we mean by this factor in terms of both HIV infection and other immune system disorders. The final rule is based on the language of the second paragraph in prior 14.00D7 and the second sentence of the third paragraph of that section. However, we are expanding that guidance and applying it to all other immune system disorders in addition to HIV infection. For example, we explain in a general way applicable to all immune system disorders that some individuals may show an initial positive response to drug treatment (or a combination of drugs), but the initial positive response may be followed by a decrease in the effectiveness of the medication.

We provide more specific information about treatment of autoimmune disorders in final 14.00G3, *How we evaluate the effects of treatment for autoimmune disorders on your ability to function.* This final rule repeats the rule in the fifth paragraph of prior 14.00B that we consider the adverse effects that may result in loss of function when we evaluate the effects of your treatment for your autoimmune disorder(s). We expanded this guidance to include more examples of potential chronic adverse effects of steroid treatment and to explain that the side effects of some medications may be acute or long-term. We add a provision that recognizes that the medications used in the treatment of autoimmune disorders may have effects on mental function, including cognition (memory), concentration, and mood.

Final 14.00G4, *How we evaluate the effects of treatment for immune deficiency disorders, excluding HIV infection, on your ability to function,* is new. As in final 14.00G3, we repeat the principle that we will consider the side effects of your treatment when we evaluate your ability to function. We cite intravenous immunoglobulin and gamma interferon therapy as examples of treatment you may be receiving. We also provide examples of side effects of treatment for immune deficiency disorders, including physical symptoms (such as severe fatigue and headaches), clinical signs (such as high blood pressure and joint swelling), or limitations in mental function, including cognition, concentration, and mood.

Final 14.00G5, *How we evaluate the effects of treatment for HIV infection on your ability to function,* is in two parts. In final 14.00G5a, *General*, as in final 14.00G3 and 14.00G4, we repeat the principle from prior 14.00D7 that we consider the side effects of antiretroviral treatment and treatment for the manifestation of HIV infection on your ability to function. We expand the guidance to provide examples of the physical and mental side effects of antiretroviral drugs. We also note that the symptoms of HIV infection and the side effects of medications may be indistinguishable, and that we will consider your functional limitations whether they are a result of your symptoms or signs of HIV infection or the side effects of your treatment.

We made two changes in final 14.00G5a in response to a public comment on the NPRM. We added a parenthetical reference to ''fat

redistribution, such as 'buffalo hump'.'' ''Fat redistribution'' is another name for lipodystrophy, which we had included in the proposed rule, and ''buffalo hump'' is a kind of lipodystrophy. We also expanded the last sentence of the paragraph to explain that we consider functional limitations from signs of HIV infection as well as from symptoms. We explain our reasons for these changes in the public comments section of this preamble.

In final 14.00G5b, *Structured treatment interruptions,* we provide new guidance specifically about structured treatment interruptions (STIs, also called drug holidays) in individuals with HIV infection. The guidance explains that STIs are part of a prescribed treatment plan; therefore, they do not show that an individual is failing to follow treatment or in themselves establish that an individual's impairment is not as severe as alleged.

In final 14.00G6, *When there is no record of ongoing treatment,* we explain how we evaluate the medical severity and duration of your immune system disorder when you have not received ongoing treatment or have not had an ongoing relationship with any treatment source despite the existence of a severe impairment(s). The provision is based on a standard provision we include in most other body system listings; for example, 1.00H3 in the musculoskeletal system, the third paragraph of 3.00A in the respiratory system, and the third paragraph of 4.00B3 in the cardiovascular system. We also explain that if you have just begun treatment and we cannot decide whether you are disabled based on the evidence we have, we may need to wait to determine the effect of your treatment. We explain that there is no set period because how long we may need to wait will depend on the facts of your individual case. This is consistent with the guidance we provided in the last two sentences of the third paragraph in prior 14.00D7, which explained that decisions about the impact of treatment should be based on a sufficient period of treatment to permit proper consideration of the temporary or long-term effects of the treatment.

Final 14.00H—How do we consider your symptoms, including your pain, severe fatigue, and malaise?

Final 14.00H is new. In it, we explain that we will evaluate the impact your symptoms have on your ability to function when the evidence of your immune system disorder(s) shows that you have a medically determinable impairment that could reasonably be expected to produce your symptoms.

We added a sentence in the final rule in response to a public comment we describe later in this preamble. The sentence explains that we will not draw any inferences about your symptoms and their functional effects from the fact that you do not receive treatment or you are not following treatment without considering all of the relevant evidence in your case record, including any explanations you provide that may explain why you are not receiving or following treatment. As we explain in more detail later, the sentence is based on a provision in Social Security Ruling (SSR) 96–7p. We also clarified the heading in the final rule by listing the two constitutional symptoms, severe fatigue and malaise, instead of referring to ''constitutional symptoms.''

Final 14.00I—How do we use the functional criteria in these listings?

We indicated in the ANPRM that we would not summarize or respond to the public comments (68 FR 24897). However, there was one theme that was common to many of the letters and e-mails and that was raised repeatedly at our two outreach meetings by the medical specialists, advocates for persons who have immune system disorders, and individuals with immune system disorders: The functional impact of immune system disorders, and the inadequacy of the immune system rules to address that impact, especially for immune system disorders other than HIV infection. This issue was raised so often, and as a matter of such great public interest, that we believe that it will be helpful to summarize briefly what commenters said to help explain why we are adding new rules for evaluating functioning in these listings.

Many commenters said that we should recognize how immune system disorders can affect an individual's functioning. Many individuals described physical symptoms, such as pain, fatigue, and malaise, as well as mental symptoms, including loss of memory, loss of concentration, and depression. Commenters stressed that these symptoms could be very severe. A number of persons indicated that the fatigue associated with these disorders was not merely a feeling of tiredness but a more profound and debilitating experience. Many individuals also noted that the impairments could be both episodic and variable in intensity, with some individuals experiencing ''good'' or relatively good days interspersed with days in which they were unable to function. They pointed out that there was a need for the rules to recognize the longitudinal effect of these episodic limitations on the ability to work. Other persons pointed out that there is often comorbidity of immune system disorders, that is, many persons have features of more than one immune system disorder. In those cases, the combination of symptoms and limitations have a multiplication effect in the individual's overall condition that is worse than simply adding the individual effects of the symptoms and limitations to each other. These commenters said that under the prior listings there is no adequate way to assess these multiplied effects. Many commenters also pointed out the effect that stress can have on the medical condition and symptomatology of individuals who have immune system disorders. Other individuals described the debilitating effects of treatment, not only the side effects, but sometimes the need to follow a very rigorous and time-consuming schedule of treatment that in itself can be limiting.

A number of the commenters pointed with approval to the provisions of prior listing 14.08N and the text in prior 14.00D8 that explains that listing. These individuals thought that the provisions should not be confined to persons who have HIV infection but should be extended to individuals with other kinds of immune system disorders who may be continuously limited by their symptoms and other manifestations, frequently become ill, have periodic manifestations, or have the kinds of serious limitations described in those rules. They urged us to consider extending such criteria to all listed immune system disorders to ensure that we do not overlook individuals who do not necessarily have the objective evidence needed to meet the other criteria in the listings but who may still be disabled.

As we have noted, in these final rules we are significantly expanding our guidance about specific immune system disorders and the effects of treatment. We also agree with those commenters on the ANPRM and at the public outreach meetings who suggested that we include the same kind of criteria for evaluating the overall functional impact of other immune system disorders as we provided in prior listing 14.08N for persons who have HIV infection. Therefore, we are adding criteria similar to those in prior listing 14.08N (final listing 14.08K) for each of the listed impairments in this body system. The final listings for evaluating functioning for other immune system disorders are 14.02B, 14.03B, 14.04D, 14.05E, 14.06B, 14.07C, 14.09D, and 14.10B. We are also redesignating prior listing 14.08N as

final 14.08K for reasons we explain below.

Final 14.00I is the section of the introductory text that explains the listings that include functional criteria. It corresponds to prior 14.00D8, but we revised it so that it applies to all of the new final listings that include functional criteria, not just the listing for HIV infection (prior listing 14.08N).

Like prior 14.00D8, final 14.00I includes eight paragraphs. Except as described below, we revised each paragraph so that it applies not only to HIV infection but to the other immune system disorders as well. For example, in the first paragraph of prior 14.00D8 we explained that prior listing 14.08N (final listing 14.08K) established standards for evaluating manifestations of HIV infection that do not meet the criteria of any of the preceding listings within 14.08; that is, prior listings 14.08A–14.08M. We also explained that we used prior listing 14.08N both for manifestations that were listed in the preceding listings within 14.08 and for manifestations that were not listed at all. We have modified this language so that it applies to all of the immune system disorders within this body system. We also made minor editorial changes throughout the paragraphs.

The following are other changes we are making in this section.

In final 14.00I2, we are removing the first sentence in the second paragraph of prior 14.00D8. That sentence explained that, for individuals with HIV infection, we assessed listing-level severity under prior listing 14.08N based on the functional limitations imposed by the impairment. We believe that this point is already made in final 14.00I1 and that it is unnecessary to repeat it in final 14.00I2. We are revising the second sentence, which said that we must consider the full impact of ''signs, symptoms, and laboratory findings'' on the individual's ability to function. We believe that this guidance may not have clearly explained what we intended. Therefore, we are revising it to explain that when we use one of the listings cited in final 14.00I1, we will consider all relevant information in your case record to determine the full impact of your immune system disorder(s) on your ability to function on a sustained basis.

In final 14.00I3–14.00I8, which correspond to the last six paragraphs in prior 14.00D, we are updating our rules to make their language more consistent with our other rules that define the term ''marked'' and the areas of functioning. However, these changes are not intended to be substantively different from the prior rules. We are also including references to both pain and severe fatigue throughout final 14.00I6–14.00I8 as symptoms that may cause limitations. The prior rules were not consistent in this regard.

We added guidance in final 14.00I3 in response to public comments on the NPRM. The guidance clarifies that your impairment will satisfy the criterion for ''repeated'' manifestations regardless of whether you have the same kind of manifestation repeatedly, all different manifestations, or a combination of some manifestations that are the same and some different; for example, two of the same kind of manifestation and one different one. You must only have the required number of manifestations with the frequency and duration required in this section. This is not a change in meaning from the proposed rules, but a clarification of our intent. In response to another comment, we also clarify that the manifestations must occur within the period covered by your claim.

Final 14.00J—How do we evaluate your immune system disorder when it does not meet one of these listings?

Final 14.00J1 and 14.00J3 replace the guidance we provided in the first and third paragraphs of prior 14.00D6. As in other provisions throughout the introductory text, we are revising the language to make it apply generally to all immune system disorders, not just HIV infection. Also, we are removing guidance that is already covered in other sections in the introductory text, such as the guidance that individuals may have signs or symptoms of a mental impairment or of another physical impairment.

Final 14.00J2 is a new section in this body system. For reasons we have already explained, we are removing reference listings—that is, listings that are met or equaled by meeting or equaling the criteria of another listing—from this body system. However, immune system disorders can have effects in virtually every body system, and we believe it is important to include guidance about those effects in the introductory text so that they are not overlooked.

Therefore, we are adding section 14.00J2 to explain that immune system disorders can have effects in other body systems; we also provide a list of examples of those effects in each of the relevant body systems with references to other body system listings. These provisions are based on language in the second paragraph of prior 14.00D6, which was relevant only to the evaluation of HIV infection, and on the reference listings we are removing. We are expanding the information that was in that paragraph to provide specific examples of impairments that may be caused by autoimmune disorders.

For example, prior listings 14.02A6 and 14.04A4 were met with evidence of SLE, systemic sclerosis, or scleroderma with ''Digestive involvement, as described under the criteria in 5.00ff.'' Apart from the fact that these listings were unnecessary because any individual who meets the criteria of a listing in the digestive body system (5.00) would be disabled under that listing, the guidance was not very specific. Also, in the prior rules, we included these criteria only under prior listings 14.02 and 14.04. However, other immune system disorders can have effects in the digestive system. Therefore, in final 14.00J2e, we provide that any immune system disorder can have effects in the digestive system, and we include an example of hepatitis C in addition to providing a reference to 5.00.

In these final rules, we are adding a reference to weight loss as a result of HIV infection that affects the digestive system in final 14.00J2e. We explain later in this preamble that our reason for adding this reference is to respond to public comments we received on the NPRM about HIV wasting syndrome.

Final 14.00J2k provides examples of allergic disorders (including skin disorders) that individuals with immune system disorders may have. It replaces prior 14.00C.

How are we changing the criteria in the immune system disorders listings for adults?

14.01—Category of Impairments, Immune System Disorders

The following is a detailed explanation of the significant changes in the final listings. Some changes are common to several listings, so we describe them first.

1. We are removing all of the reference listings from this body system for reasons we have already explained.

2. We are revising prior listings 14.02B, 14.03B, 14.04B, and 14.09D (final listings 14.02A, 14.03A, 14.04A, and 14.09B) as follows:

- We are removing the criterion for ''significant, documented'' constitutional symptoms or signs in each of these listings because we define the constitutional symptoms and signs in final 14.00C2. Moreover, it is unnecessary to specify ''documented'' because we always need to document the existence of any symptom or sign in any disability claim.
- Each of these prior listings, except prior listing 14.09D, also required you to

have all four of the constitutional symptoms or signs: Severe fatigue, fever, malaise, and involuntary weight loss. We are revising this requirement to ''at least two'' of the constitutional symptoms or signs, instead of all four, because we believe that the requirement in the prior listings was too severe. We believe that any individual with an autoimmune disorder involving two or more organs/body systems with one organ/body system involved to at least a moderate level of severity and who has at least two of the constitutional symptoms and signs in these listings will have an impairment that precludes any gainful activity. We have also added ''involuntary'' as a descriptor of weight loss in final listings 14.02A, 14.03A, 14.04A, 14.05E, 14.06A, 14.07C, 14.08K, 14.09B, and 14.10A for reasons we explained earlier in this preamble.

• In final listings 14.02A, 14.03A, and 14.04A, which correspond to prior listings 14.02B, 14.03B, and 14.04B, we are removing the reference to ''lesser involvement'' because we are removing the prior reference listings to which these rules refer. We also believe the phrase is unnecessary—the severity of the impairment is demonstrated by the remaining criteria.

3. As we have already noted under the explanation of final 14.00I, we are adding listings based on repeated manifestations accompanied by functional limitations and modeled after prior listing 14.08N (final listing 14.08K) for each of the other immune system disorders. The final listings are:

• 14.02B for SLE,
• 14.03B for systemic vasculitis,
• 14.04D for systemic sclerosis (scleroderma),
• 14.05E for polymyositis and dermatomyositis,
• 14.06B for undifferentiated and mixed connective tissue disease,
• 14.07C for immune deficiency disorders, excluding HIV infection,
• 14.09D for inflammatory arthritis, and
• 14.10B for Sjögren's syndrome.

Each listing requires you to have:

• The specified immune system disorder for that listing,
• Repeated manifestations of the specified immune system disorder,
• At least two of the constitutional symptoms or signs, and
• A ''marked'' limitation in one of three domains of functioning: Activities of daily living, maintaining social functioning, or completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

We explain what we mean by ''repeated'' in final 14.00I3 and by ''marked'' in final 14.00I4–5.

In the final rules, we made a number of changes from the proposed rules in response to public comments on the NPRM. Chiefly, we removed from several listings the requirement that there must be manifestations ''without the requisite findings in'' a specified paragraph earlier in the listing; for example, proposed listing 14.02B said ''without the requisite findings in [14.02]A.'' Our only intent was to explain that we would use the listing criterion (for example, listing 14.02B) when you have an impairment that does not meet the requirements of the previously specified listing section (for example, listing 14.02A). However, a public comment pointed out that our language could have been confusing, and we determined that it was not necessary to have it at all. We explain in detail the public comment and our reasons for making this change throughout the final listings in the public comments section of this preamble.

The following is an explanation of the other significant changes we are making. We are also making minor editorial changes in some listings and changes to cross-references to the introductory text throughout the listings to reflect the changes to the introductory text for the final rules. We do not describe all of those changes below.

Final Listing 14.04—Systemic Sclerosis (Scleroderma)

Final listing 14.04B corresponds to prior listing 14.04C. As we have already noted, we are expanding this listing to include provisions for individuals who had a form of the disorder as children and who still have listing-level functional limitations as adults. The final listing is essentially identical to final listing 114.04, which we describe in detail later in this preamble, except that it includes references to appropriate adult rules defining ''inability to ambulate effectively'' and ''inability to perform fine and gross movements effectively.''

We are also making minor clarifications in the language of the prior listing. Prior listing 14.04C described ''[g]eneralized scleroderma with digital contractures.'' We are clarifying that ''digital'' refers to either the toes or the fingers and are listing the effects in the toes separately from the effects in the fingers in final listings 14.04B1 and 14.04B2, respectively. We also are removing the requirement for ''generalized'' scleroderma (that is, systemic sclerosis) because the very serious digital contractures described in the final listings would in themselves be disabling regardless of whether the scleroderma is generalized.

Final listing 14.04C corresponds to prior listing 14.04D. We are changing ''Raynaud's phenomena'' in prior listing 14.04D to ''Raynaud's phenomenon'' for the same reason already described in the explanation of final 14.00D3. We are removing the word ''[s]evere'' as a descriptor of Raynaud's phenomenon in this listing because it is unnecessary given the severity of the impairment demonstrated by the remaining criteria, such as ischemia with ulcerations of toes or fingers, resulting in the inability to ambulate effectively or to perform fine and gross movements effectively. As in final listing 14.04B, we also are clarifying that ''digital'' refers to fingers or toes.

In final listing 14.04C, we are also revising the criteria in prior listing 14.04D to provide a better description of listing-level Raynaud's phenomenon. The criteria in prior listing 14.04D required severe Raynaud's phenomenon characterized by digital ulcerations, ischemia, or gangrene. As we noted in the NPRM, we believe that this included some individuals who did not have impairments of listing-level severity.

Therefore, in final listing 14.04C1, we provide criteria for Raynaud's phenomenon characterized by gangrene involving ''at least two extremities'' to establish an impairment that would preclude any gainful activity. The final rule is somewhat different from the proposed rule, which referred to fingers and toes. We clarified it in response to a public comment on the NPRM that we describe in the public comments section of this preamble. As in the NPRM, we do not require that the gangrene result in the inability to ambulate effectively or to perform fine and gross movements effectively because the presence of gangrene involving at least two extremities by itself demonstrates a very serious impairment.

In final listing 14.04C2, we provide criteria for ischemia with ulcerations of the toes or fingers that results in the inability to ambulate effectively or to perform fine and gross movements effectively; Raynaud's phenomenon characterized only by ischemia with ulcerations does not, by itself, describe an impairment that would necessarily result in an extreme loss of function. Also, ulcerations are an outcome of ischemia, so we are revising the language of the prior rule so that ischemia and ulcerations are not listed as though they are separate entities.

Final Listing 14.05—Polymyositis and Dermatomyositis

Final listing 14.05A corresponds to prior listing 14.05A. We are replacing the word ''severe'' as a descriptor of proximal limb-girdle weakness with the more accurate ''resulting in inability to ambulate effectively or inability to perform fine and gross movements effectively, as defined in 14.00C6 and 14.00C7.'' We are also changing ''shoulder and/or pelvic'' muscle weakness to ''pelvic or shoulder'' muscle weakness because either pelvic muscle weakness that results in the inability to ambulate effectively or shoulder muscle weakness that results in the inability to perform fine and gross movements effectively is sufficient in itself to show disability, and the ''and'' is unnecessary.

Final listing 14.05B corresponds to prior listing 14.05B1. We are removing a number of the requirements from the prior rule because we have determined that impaired swallowing with aspiration due to muscle weakness establishes a listing-level impairment. We are revising the requirement for ''episodes of aspiration'' to only ''aspiration'' because of the progressive nature of muscle weakness that results from polymyositis or dermatomyositis. Once an episode of aspiration is documented, further documentation of multiple episodes is unnecessary. In addition, we are replacing ''cricopharyngeal weakness'' with ''muscle weakness'' in final 14.05B because impaired swallowing and aspiration may result from muscles other than the cricopharyngeal muscles. Finally, we are revising the phrase ''impaired swallowing with dysphagia'' to ''impaired swallowing (dysphagia)'' because ''dysphagia'' means impaired swallowing.

Final listing 14.05C corresponds to prior listing 14.05B2, for individuals who have polymyositis or dermatomyositis with impaired respiration due to intercostal and diaphragmatic muscle weakness.

Final listing 14.05D, Diffuse calcinosis, is a new listing for adults that has the same criteria as final listing 114.05D for children, which we describe in detail later in this preamble. We are adding this listing for individuals who had a form of the disorder as children and who still have listing-level functional limitations as adults.

Final Listing 14.06—Undifferentiated and Mixed Connective Tissue Disease

We are changing the heading of prior 14.06 to update it and to more accurately describe the disorders we evaluate under this listing.

Prior listing 14.06 was entirely a reference listing, requiring evaluation under prior listings 14.02A, 14.02B, or 14.04. We are changing it to a stand-alone listing. Final listing 14.06A contains the same criteria as final listings 14.02A, 14.03A, and 14.04A; that is, involvement of two or more body systems to at least a moderate level of severity and at least two of the constitutional symptoms or signs. Final listing 14.06B contains the same functional criteria for the evaluation of repeated manifestations of undifferentiated and mixed connective tissue disease as the other listings in this body system.

Final Listing 14.07—Immune Deficiency Disorders, Excluding HIV Infection

We are changing the heading of listing 14.07 to update its terminology and to more accurately describe the disorders we evaluate under this listing.

The prior listing was met with documented, recurrent severe infections occurring three or more times within a 5-month period. We are replacing this criterion with a more accurate and up-to-date listing. The listing is in three parts.

Final listing 14.07A is essentially the same as final listing 14.08J (prior listing 14.08M), which describes individuals with HIV infection whose immune systems are so compromised that they frequently become ill. We believe that these criteria for individuals with HIV infection are equally as applicable to individuals with other kinds of immune deficiency disorders, and that they are more inclusive than the criteria in prior listing 14.07.

As in final listing 14.08J, final listing 14.07A provides that the infections must occur three times in a 12-month period, not three times in only a 5-month period. It also more precisely explains how severe the infections need to be by requiring either resistance to treatment or a need for hospitalization or intravenous treatment. It also specifies six types of infections.

Final listing 14.07B is new. We are adding this listing to recognize that some immune system disorders are treated by stem cell transplantation. In final listing 14.07B, we state that we will consider you to be under a disability until at least 12 months from the date of transplantation and, thereafter, evaluate any residual impairment(s) under the criteria for the affected body system.

Final listing 14.07C incorporates the same functional criteria for the evaluation of repeated manifestations of immune deficiency disorders (excluding HIV infection) as in the other final listings in this body system and for the same reasons as described above.

Final Listing 14.08—Human Immunodeficiency Virus (HIV) Infection

Except as described below, we are not making any changes to the criteria in listing 14.08. As noted in the NPRM, we carefully considered the advances in treatment and consequent increases in longevity that have occurred since we published the prior rules in 1993. Based on this review, we did not believe that there had been sufficient progress in the treatment and control of HIV infection to warrant any change in these rules at that time. However, as a result of public comments we received on the NPRM, we now believe that some changes may be appropriate. Therefore, while final listing 14.08 is substantively the same as proposed listing 14.08, we are publishing separately an ANPRM in today's edition of the **Federal Register** inviting comments and suggestions on how to update and revise our listing for HIV infection. We will consider the comments and suggestions that we receive in response to the ANPRM, as well as our adjudicative experience and additional information about advances in medical knowledge, treatment, and methods of evaluating HIV infection. If we determine that listing 14.08 should be revised, we will publish for public comment an NPRM that will propose specific revisions to the listing.

As already noted, we are removing reference listings throughout this body system, including the reference listings in listing 14.08. This results in the removal of several specific listings within 14.08 and the redesignation of some of the prior listings; for example, prior listing 14.08N has become final listing 14.08K. Where we are removing a reference listing, however, we have ensured that we provide guidance in the introductory text about where to evaluate the impairment. For example, prior listing 14.08A4, for HIV infection with syphilis or neurosyphilis, was a reference listing that said only to consider the impairment under the criteria for the affected body system, such as 2.00 (special senses and speech), 4.00 (cardiovascular system), or 11.00 (neurological). Although we are removing this reference listing, we include this same guidance in final 14.00J2l.

We are also clarifying some of the rules. In final listing 14.08B2, we are reorganizing the language from prior listing 14.08B2 to make it clearer that we evaluate under this listing candidiasis involving the esophagus,

trachea, bronchi, or lungs, or at another site other than the skin, urinary tract, intestinal tract, or oral or vulvovaginal mucous membranes. We are moving prior listing 14.08C2, for PCP, from the listing for protozoan and helminthic infections to the listing for fungal infections because the organism that causes PCP is now known to be a fungus. We redesignate it as final listing 14.08B7.

We are redesignating prior listing 14.08N as final listing 14.08K. We are expanding our guidance on manifestations we evaluate under final listing 14.08K by adding ''pancreatitis, hepatitis, peripheral neuropathy, glucose intolerance, muscle weakness, cognitive or other mental limitation'' as new examples. We are also expanding our list of signs and symptoms by adding ''nausea, vomiting, headaches, or insomnia.''

We made minor changes to the language of the functional criteria in final listing 14.08K from the language in prior listing 14.08N. For example, we replaced the words ''restriction'' in prior listing 14.08N1 and ''difficulties'' in prior listings 14.08N2 and 14.08N3 with the word ''limitation'' in final listings 14.08K1, 14.08K2, and 14.08K3. We made this change because ''limitation'' is a more accurate description for the functional criteria in these listings.

We are making a number of changes from the proposed rule in response to public comments on the NPRM and for editorial reasons. The changes are in:

- Final listing 14.08B2, in which we made a minor editorial correction to remove a redundant word;
- Final listing 14.08B7, in which we removed the word ''*carinii*'' and the parenthetical ''*jiroveci*'' from the name of ''*Pneumocystis* pneumonia'' in response to a public comment on the NPRM;
- Final listing 14.08E4, in which we revised the criterion from ''squamous cell carcinoma of the anus'' to ''squamous cell carcinoma of the anal canal or anal margin'' in response to a public comment on the NPRM; [1]
- Final listing 14.08H, in which we clarified that the 10 percent loss of weight from baseline may be calculated in pounds, kilograms, or by body mass index (BMI) in response to a public comment on the NPRM;
- Final listing 14.08J, in which we removed an unnecessary comma; and
- Final listing 14.08K, in which we changed the reference to ''fatigue'' to ''severe fatigue'' and a reference to a ''mental impairment'' to a ''mental limitation'' in response to public comments on the NPRM, and removed the proposed cross-reference to 14.00I5. The removal of the cross-reference is only editorial. The reference was unnecessary, incomplete (the term ''marked'' for the various domains is also defined in final 14.00I6, 14.00I7, and 14.00I8), and inconsistent with other sections of the proposed immune disorder listings which contained the same severity criteria but did not include this cross-reference.

We provide detailed explanations of the changes we made in response to public comments on the NPRM and our reasons for making them in the public comments section of this preamble.

Final Listing 14.09—Inflammatory Arthritis

We are redesignating prior listing 14.09D as final listing 14.09B, prior listing 14.09B as final listing 14.09C1, and prior listing 14.09E as final listing 14.09C2 to put these listings in a more logical order. In the final rules, listing 14.09A describes persistent inflammation or deformity of major peripheral joints that alone is disabling, while listing 14.09B describes disability with lesser inflammation or deformity of major peripheral joints together with organ involvement and constitutional symptoms or signs. Final listing 14.09C describes listing-level inflammatory arthritis of the spine. Final listing 14.09C1 describes disability based only on fixation (ankylosis) of the spine, while final listing 14.09C2 describes disability based on a lesser degree of ankylosis of the spine with organ involvement. Final listing 14.09D is the same functional listing we include in all of the final immune system disorders listings and applies to inflammatory arthritis affecting any joints.

Final listing 14.09A corresponds to prior listing 14.09A. We are removing the requirement for a history of joint pain, swelling, and tenderness from this listing because it is unnecessary. (We do refer to joint pain, swelling, and tenderness in final 14.00D6a as possible signs and symptoms of the disorder.) Persistent joint inflammation or deformity in one or more major peripheral weight-bearing joints resulting in the inability to ambulate effectively, or persistent joint inflammation or deformity of major peripheral joints in both upper extremities resulting in inability to perform fine and gross movements effectively, is in itself indicative of an impairment that would preclude any gainful activity. For the same reasons, we are also removing the requirement for ''signs on current physical examination.'' We do not need signs of joint inflammation on a current physical examination when we have medical evidence documenting that you have inflammatory arthritis that results in the inability to ambulate effectively or inability to perform fine and gross movements effectively. Also, because of the episodic nature of inflammatory arthritis, a current physical examination could show a brief period of improvement for a few days even though your longitudinal medical records may show persistent joint inflammation that results in the inability to ambulate effectively or inability to perform fine and gross movements effectively.

As we noted under the explanation of final 14.00D6e, we are revising listing 14.09A in response to a public comment on the NPRM so that there is no longer a need to use listing 1.02 or 1.03 in cases involving inflammatory arthritis. Final listing 14.09 (and final listing 114.09) will apply to all individuals who have listing-level limitations as a result of inflammatory arthritis. The revised listing includes essentially the same requirements as listings 1.02 and 1.03 of the musculoskeletal listings.

Because of this, we are changing the structure of final listing 14.09A to provide separate criteria for inflammatory arthritis that involves one or more major peripheral weight-bearing joints (final listing 14.09A1) and inflammatory arthritis involving one or more major peripheral joints in both upper extremities (final listing 14.09A2), with appropriate severity criteria for each. We define the ''major peripheral joints'' in final 14.00C8.

Final listing 14.09B corresponds to prior listing 14.09D. The revisions in final 14.09B are similar to those in final listing 14.09A for the same reasons and to make it clearer that this listing requires joint inflammation in one or more major peripheral joints. Final 14.09B continues to require less joint involvement than in A, but we no longer require ''lesser extra-articular features than in C'' because ''C'' refers to prior reference listing 14.09C, which we have removed. Final listing 14.09B1 corresponds to prior listing 14.09D2 with nonsubstantive editorial changes to make it consistent with how we present this criterion throughout these listings. Final listing 14.09B2 corresponds to prior listing 14.09D1 except that we have removed the phrase ''significant, documented'' for reasons we have already explained. We are also correcting an error in prior listing 14.09D1. The explanatory abbreviation, ''e.g.'' (for example) in prior listing

[1] We also made minor conforming changes in prior 13.00A and 113.00A of the malignant neoplastic diseases listings to reflect this change.

14.09D1 inaccurately indicated that the four constitutional symptoms or signs, that is, severe fatigue, fever, malaise, and involuntary weight loss, were only examples when they are in fact a complete list. Consistent with changes in other final listings, we are requiring at least two of the constitutional symptoms or signs because we believe that the criteria in final listing 14.09B are indicative of an impairment that precludes any gainful activity.

Final listing 14.09C1 corresponds to prior listing 14.09B. We are reorganizing the criteria and removing the requirements for ''diagnosis established by findings of unilateral or bilateral sacroiliitis (e.g., erosions or fusions)'' and ''[h]istory of back pain, tenderness, and stiffness'' because these findings are unnecessary. We believe ankylosing spondylitis or other spondyloarthropathies with ankylosis of the dorsolumbar or cervical spines at 45° or more of flexion documented as required in final listing 14.09C1 are in themselves indicative of an impairment that precludes any gainful activity.

Final listing 14.09C2 corresponds to prior listing 14.09E. We are reorganizing this listing to make it more consistent with the structure and criteria that we use in the final listings for other autoimmune disorders. We are removing the phrase ''with lesser deformity than in B,'' which describes a deformity that is less than the fixation ''of the dorsolumbar or cervical spine at 45° or more of flexion'' under prior listing 14.09B, and replacing it with fixation ''at 30° or more of flexion (but less than 45°).'' We believe that this is a clearer and more specific criterion that helps to provide greater uniformity in adjudications under this listing. We are removing the phrase ''lesser extra-articular features than in C'' because it refers to prior reference listing 14.09C, which we are removing. We also are removing the phrase ''with signs of unilateral or bilateral sacroiliitis'' because the criteria in the final listing would be sufficient to show listing-level severity without this requirement, and the phrase ''with the extra-articular features described in 14.09D'' because it is unnecessary.

Final Listing 14.10—Sjögren's Syndrome

Final listing 14.10 is new. We are adding it in response to comments we received before we developed the NPRM indicating that Sjögren's syndrome is distinct from other immune system disorders and that it has unique aspects that the prior immune system listings did not address.

Although individuals with Sjögren's syndrome were able to qualify under prior listings 14.03 and 14.09 and other listings, we believe that it is now appropriate to list Sjögren's syndrome separately in these listings. We are using the same two listing criteria for establishing listing-level severity as in the other final listings for autoimmune disorders because Sjögren's syndrome is an autoimmune disorder that can cause the same kinds of constitutional symptoms and signs as other autoimmune disorders, and because it can be as functionally limiting as other autoimmune disorders. Final listing 14.10A is the same as final listings 14.02A, 14.03A, 14.04A, and 14.06A, and final listing 14.10B is the same as final listings 14.02B, 14.03B, 14.04D, 14.05E, 14.06B, and 14.09D. As already noted, we also provide a new separate section in the introductory text that describes the unique features of Sjögren's syndrome, final 14.00D7.

How are we changing the introductory text for the immune system disorders listings for children?

As in final 14.00 in the adult rules, we are changing the name of this body system to ''Immune System Disorders.''

Except for minor editorial changes, we have repeated much of the introductory text of final 14.00 in the introductory text of final 114.00. This is because the same basic rules for establishing and evaluating the existence and severity of immune system disorders in adults also apply to children. Because we have already described these provisions under the explanation of final 14.00, the following discussions describe only those provisions that are unique to the childhood rules or that require further explanation. We describe only the major provisions. For example, we do not summarize minor editorial changes that refer to ''children'' instead of adults or to the policy of ''functional equivalence'' instead of RFC assessment and steps in the adult sequential evaluation process.

Also, where appropriate in the introductory text of final 114.00, we have made an editorial change from the prior rules in the terms we use to identify the age categories of children in the introductory text of prior 114.00 to be consistent with the terms we use in the introductory text of current 112.00, Mental disorders. For example, in final 114.00F1b(ii), we use ''newborn and younger infants (birth to attainment of age 1)'' instead of ''an infant 12 months of age or less'' as in prior 114.00D3b(i).

Finally, we have changed the part B final rules from the NPRM in the same way that we changed the part A final rules from the NPRM whenever those proposed rules were the same.

Final 114.00A—What disorders do we evaluate under the immune system disorders listings?

In final 114.00A1b, we incorporate the first sentence in the last paragraph of prior 114.00B, which explains that immune system disorders may affect growth, development, attainment of age-appropriate skills, and performance of age-appropriate activities in children. We are revising the sentence by adding the phrase ''or their treatment.'' We are also removing the phrase ''attainment of age-appropriate skills'' because it is redundant of ''development.''

Final 114.00A2 is essentially the same as final 14.00A2 and similar to the first and second paragraphs of prior 114.00B. We are expanding and clarifying the guidance in the second paragraph to explain that autoimmune disorders or their treatment may have a considerable impact on the physical, psychological, and developmental growth of pre-pubertal children that often differs from that of post-pubertal children or adults. We are also removing the last sentences from both the first and second paragraphs of prior 114.00B because they cross-referred to 14.00 in the part A listings. In part B of these final rules, we are repeating criteria from part A when they are appropriate for evaluating children so it should rarely be necessary to refer back to 14.00 in part A.

Final 114.00D—How do we document and evaluate the listed autoimmune disorders?

Final 114.00D parallels the structure and content of final 14.00D in the adult rules, except where the features commonly associated with the autoimmune disorders in these listings differ in children from adults.

In final 114.00D2, *Systemic vasculitis (114.03)*, as in prior 114.00C3, we provide guidance (in final 114.00D2a(ii)) on how we evaluate Kawasaki disease and add guidance about anaphylactoid purpura (Henoch-Schoenlein purpura). Also, in final 114.00D2a(ii), we do not use the example of giant cell arteritis (temporal arteritis) that is in final 14.00D2a(ii) because this disorder occurs almost exclusively in individuals over 50 years of age.

In final 114.00D3c, *Localized scleroderma (linear scleroderma or morphea)*, we describe features of focal forms of scleroderma in children. These disorders occur primarily in children and are more common than systemic sclerosis in children. In final

114.00D3c(i), we explain that the extent of involvement and the location of the lesions are important factors in determining the limitations resulting from scleroderma. We also note that it may be appropriate to evaluate the limitations resulting from these impairments under the musculoskeletal listings (101.00).

In final 114.00D3c(ii), we describe features of isolated morphea of the face and explain that it may be more appropriate to evaluate the limitations from these disorders under the affected body system, such as special senses and speech (102.00) or mental disorders (112.00). We have made a minor correction in the final rule. In the NPRM, we indicated that it would be more appropriate to evaluate the limitations from these disorders only under the special senses or mental disorders listings. However, we explained in the preamble that these body systems were only examples of body systems that might be affected. In the final rule, we are clarifying that the body systems we cite are only examples. We have made the same correction in part A.

In final 114.00D3c(iii), we describe musculoskeletal and respiratory features of chronic variants of these syndromes and explain that it is appropriate to evaluate the limitations from these disorders under the musculoskeletal listings (101.00) or respiratory system listings (103.00).

In final 114.00D4, *Polymyositis and dermatomyositis (114.05)*, we note (in final 114.00D4a, *General*) that polymyositis occurs rarely in children and describe the features of dermatomyositis that occur differently in children than in adults.

In children, polymyositis and dermatomyositis usually do not occur in association with malignancies. For this reason, we do not include a reference to malignancy or provide guidance that we will evaluate malignancies under the malignant neoplastic diseases listings (113.00) in final 114.00D4, as we do for adults in final 14.00D4. However, unlike in the adult rules, we include a reference to calcinosis for children in this section. Calcinosis is primarily an outcome of juvenile dermatomyositis; when adults with dermatomyositis have calcinosis, it is generally because they have had the condition since childhood. For this reason, we refer to calcinosis only in the introductory text for children, final 114.00D4. However, we include a criterion for diffuse calcinosis in final listing 14.05D (as well as final listing 114.05D) for adults who have the condition. Also, when dermatomyositis involves other organs or body systems, we evaluate the involvement under the affected body system.

In final 114.00D4b, *Documentation of polymyositis or dermatomyositis*, we note that magnetic resonance imaging (MRI) showing muscle inflammation or vasculitis provides additional evidence of childhood dermatomyositis. We did not provide this guidance in final 14.00D4b because MRI findings are not considered diagnostic of dermatomyositis in adults. Similar to final 14.00D4b, we added two sentences to the final rule to indicate that when the results of electromyography, muscle biopsy, or MRI are in your medical records we will make every reasonable effort to obtain them, but that we will not purchase any of these tests.

In final 114.00D4c(i), we explain how to evaluate polymyositis and dermatomyositis under the listings in newborn and younger infants.

In final 114.00D5, *Undifferentiated and mixed connective tissue disease (114.06)*, we note (in final 114.00D5a, *General*) that the most common pattern of undifferentiated autoimmune disorders in children is mixed connective tissue disease (MCTD). In final 114.00D5b, *Documentation of undifferentiated and mixed connective disease*, we note diagnostic laboratory findings specifically for children with MCTD and that the clinical findings are often suggestive of SLE or childhood dermatomyositis. We also note that many children later develop features of scleroderma.

In final 114.00D6, *Inflammatory arthritis (114.09)*, we incorporate (in final 114.00D6a, *General*) guidance from prior 114.00C2 and 114.00E. We explain that we evaluate growth impairment resulting from inflammatory arthritis under the criteria in 100.00. In final 114.00D6b, *Inflammatory arthritis involving the axial spine* (*spondyloarthropathy*), we incorporate the second sentence in prior 114.00E and revise some of the examples of disorders that may be associated with inflammatory spondyloarthropathies involving the axial spine with disorders that are more common in children.

Prior 114.00E6 provided that the fact that a child is dependent on steroids, or any other drug, for the control of inflammatory arthritis is, in and of itself, insufficient to find disability. It explained that advances in the treatment of inflammatory connective tissue disease and in the administration of steroids for its treatment have corrected some of the previously disabling consequences of continuous steroid use. Although this statement is still true, we are not including this provision of prior 114.00E6 in these final rules because we believe we no longer need it in the introductory text for the listings.

We added prior 114.00E6 in 2002 (66 FR at 58022 and 58045). It was important when we added it because the listings prior to the revisions we made in 2002 included a listing (prior listing 101.02B) that said that all children with rheumatoid arthritis who were dependent on steroids were disabled. We removed that listing in 2002, explaining that, although the prior listing was appropriate when we first published it, advances in treatment and other reasons had made it obsolete (66 FR at 58022). Thus, the paragraph in the introductory text served as a reminder that we no longer had that listing and that it was no longer appropriate to presume disability based on steroid use alone. Now that several years have passed since we removed the prior listing, we do not believe that we need this reminder any longer. However, in final 114.00G3, we continue to state that we will consider the adverse side effects of treatment, including the effects of corticosteroids, to ensure that our adjudicators remember to consider the side effects of steroids and any other treatment an individual might have.

Final 114.00F—How do we document and evaluate human immunodeficiency virus (HIV) infection?

Final 114.00F parallels the structure and content of final 14.00F in the adult rules, except where the features commonly associated with HIV infection differ in children from adults.

Final 114.00F1a, *Definitive documentation of HIV infection*, corresponds to 114.00D3a in the prior rules and 14.00F1a in the final rules. In final 114.00F1a(i), we are lowering the age for using HIV antibody tests from the 24 months of age or older that was in prior 114.00D3a(i) to 18 months or older. Current clinical practice now accepts these tests beginning at 18 months of age.

In final 114.00F1a(iv), we clarify the provision in prior 114.00D3a(ii) by explaining that a specimen that contains HIV antigen may be used to establish the diagnosis of HIV infection in a child age 1 month or older.

Final 114.00F1b, *Definitive documentation of HIV infection in children from birth to the attainment of 18 months*, corresponds to the second paragraph in prior 114.00D3b, *Other acceptable documentation of HIV infection in children*. We are moving this information and revising the age cutoff to 18 months to recognize that laboratory values we previously considered to be ''other acceptable

documentation'' of HIV infection are now considered definitively diagnostic in children from birth to age 18 months who have tested positive for HIV antibodies.

In final 114.00F1b(i), we add ''One or more of the tests listed in F1a(ii)–F1a(vii)'' of final 114.00F1a because these tests are accepted as diagnostic of HIV infection.

In final 114.00F1b(iii), we change ''12 to 24 months of age'' in current 114.00D3b(ii) to ''12 to 18 months of age'' based on how these findings are used in current clinical practice.

In final 114.00F1b(v), we specify that a severely diminished immunoglobulin G (IgG) level is ''< 4g/l or 400 mg/dl.'' However, we do not provide an IgG level for greater than normal range for age due to the variability in the higher normal range of IgG level in children by age. There is consistency in the normal lower average range in children, so we are able to specify levels for severely diminished IgG.

Final 114.00F1c, *Other acceptable documentation of HIV infection*, corresponds to prior 114.00D3b and final 14.00F1b. We are removing the first paragraph in prior 114.00D3b, which explained that HIV infection is not documented in children under 24 months of age by a serum specimen containing HIV antibodies. All infants who have HIV antibodies are now tested to determine definitively whether they have HIV infection.

In final 114.00F2, *CD4 tests*, we add more detailed guidance to the second paragraph of prior 114.00D4a by specifying that the extent of immune depression correlates with the level of CD4 counts (relative to the age of the child), and that by age 6, CD4 levels become comparable to adult CD4 levels.

In final 114.00F3b, *Other acceptable documentation of the manifestations of HIV infection*, we explain, in 114.00F3b(i) for PCP and in 114.00F3b(ii) for CMV disease, that a CD4 count below 200 in children 6 years of age or older is supportive evidence of a presumptive diagnosis of these manifestations.

Final 114.00F4, *HIV manifestations specific to children*, corresponds to prior 114.00D5, *HIV in children*. In final 114.00F4a, *General*, we are removing the second sentence in prior 114.00D5. That sentence explained that survival times were shorter for children who were infected in the first year of life than they were for older children and adults. However, due to advances in medical treatment this is no longer the case. The second sentence of final 114.00F4a is based on the first paragraph in prior 114.00D5.

In final 114.00F4b, *Neurologic abnormalities*, we make some nonsubstantive editorial changes to the second paragraph in prior 114.00D5 in which we explained that the methods of identifying and evaluating neurological abnormalities vary depending on a child's age. We also replace ''acquisition'' with ''onset'' in the last sentence of final 114.00F4b because a sudden ''onset'' of a new learning disability is medically a more accurate description of how this neurologic abnormality would manifest in a child with HIV infection.

In final 114.00F4c, *Bacterial infections*, we incorporate the last two paragraphs in prior 114.00D5. We make only nonsubstantive editorial changes, including removing text that only repeats criteria from the listings.

Final 114.00G—How do we consider the effects of treatment in evaluating your autoimmune disorder, immune deficiency disorder, or HIV infection?

In final 114.00G2, *Variability of your response to treatment*, we use an example of a child who develops otitis media instead of pneumonia or tuberculosis as we do in final 14.00G2 for an adult because otitis media is more common in children.

In final 114.00G3, *How we evaluate the effects of treatment for autoimmune disorders on your ability to function*, we use examples of impaired growth and osteopenia instead of osteoporosis as we do in final 14.00G3 because impaired growth and osteopenia are more common in children.

Final 114.00I—How do we use the functional criteria in these listings?

As in the adult rules, we are adding listings based on functional criteria to each of the listings in the immune system in addition to those that are already in listing 114.08. Final 114.00I—*How do we use the functional criteria in these listings?*—corresponds to prior 114.00D8 and provides guidance for applying the listings based on functional criteria in all of the final childhood listings. We revised the prior language to reflect the fact that there are now functional listings for each of the listed impairments in this body system and for consistency with adult rules where appropriate.

Final 114.00J— How do we evaluate your immune system disorder when it does not meet one of these listings?

In final 114.00J2, we repeat the guidance in final 14.00J but with appropriate references to childhood listings in part B, including an example of growth impairment under 100.00.

How are we changing the criteria in the immune system disorders listings for children?

Final 114.01—Category of Impairments, Immune System Disorders

As in the adult listings in part A, we are removing all reference listings from part B. We also add listings like final listing 114.08L (prior listing 114.08O) for each of the other listed impairments in this body system. (As in the NPRM, we are redesignating prior listing 114.08O as final listing 114.08L because of the deletion of reference listings.) The new listings are final listings 114.02B, 114.03B, 114.04D, 114.05E, 114.06B, 114.07C, 114.09D, and 114.10B. The functional criteria in the final listings for children are the same as in prior listing 114.08O, using the functional criteria in listings 112.02 and 112.12. They are different from the functional criteria in part A because the childhood functional criteria vary depending on the age of the child and are a better way to measure broad functional limitations in children.

The following is a description of the significant changes in part B when they are different from the changes we made in part A or require additional explanation.

Final Listing 114.04—Systemic Sclerosis (Scleroderma)

Final listings 114.04B1 and 114.04B2 correspond to prior listing 114.04B1. We are changing the requirement in prior listing 114.04B1 for fixed deformity of ''both feet'' to ''one or both feet'' and adding ''inability to ambulate effectively'' to the listing criteria. This will allow some children with a serious deformity in only one foot to qualify based on the functional limitation we use to define listing-level severity throughout these listings. We are also adding a criterion for ''toe contractures'' to final 114.04B1, even though toe contractures of listing-level severity would be rare in children, to make it consistent with the criterion in final 14.04B1. We are retaining the requirement for involvement of both hands in final listing 114.04B2, because inability to perform fine and gross movements effectively can occur only when both upper extremities are affected. We are adding the criterion of ''finger contractures'' to final 114.004B2 for the same reason we are adding ''toe contractures'' to final 114.04B1.

Final listings 114.04B3 and 114.04B4 correspond to prior listing 114.04B2, the listing for ''[m]arked destruction or marked atrophy of an extremity.'' We are revising the prior rules to:

- Remove the word ''marked,''

• Change the criterion for ''destruction'' to ''irreversible damage,''

• Require both atrophy and irreversible damage in one or both lower extremities or both upper extremities, and

• Require either inability to ambulate effectively or to perform fine and gross movements effectively.

We are removing the word ''marked'' because we use it in various other listings and other regulations to describe a particular measure of functional limitations, and it does not describe what we intend in this listing. We are replacing the criterion for ''marked destruction'' with a criterion for ''irreversible damage'' because it is a more accurate medical description of this complication of systemic sclerosis. We are requiring both atrophy and irreversible damage because we would not expect either of these findings alone to establish an impairment that results in marked and severe functional limitations in every case. Finally, we are requiring ''inability to ambulate effectively'' or ''inability to perform fine or gross movements effectively'' to establish an impairment that is of listing-level severity, consistent with other listings.

Final listing 114.04C, Raynaud's phenomenon, is a new childhood listing and has the same criteria as in final listing 14.04C for adults.

Final Listing 114.05—Polymyositis and Dermatomyositis

We are removing prior listing 114.05B1 because multiple joint contractures are not typically a part of the disease process of polymyositis or dermatomyositis in children. However, if this should occur, we would evaluate whether your polymyositis or dermatomyositis with multiple joint contractures meets or medically equals the criteria in final listing 114.05E, medically equals the criteria in another listing, such as final listing 114.05A, or functionally equals the listings.

In final listing 114.05D, we are revising prior listing 114.05B2 by replacing ''cutaneous calcification'' with ''calcinosis.'' We are making this change because ''calcification'' describes the normal process by which calcium salts are deposited in bone, and ''calcinosis'' describes the abnormal deposits of calcium salt in body tissues as we intend by this criterion. We are also replacing ''formation of an exoskeleton'' with ''limitation of joint mobility or intestinal motility'' because it is a better description of the known complications of dermatomyositis in children.

Final Listing 114.07—Immune Deficiency Disorders, Excluding HIV Infection

We are removing prior listing 114.07B because of advances in medical knowledge that now allow the identification of different subgroups of thymic dysplastic syndromes. The subgroups of these disorders vary in severity, and therefore, we will evaluate them under final listing 114.07A, B, or C, as appropriate to the particular immune deficiency disorder and its effects.

Final Listing 114.08—Human Immunodeficiency Virus (HIV) Infection

In final listing 114.08A4, we have added a reference to final 114.00F4c in response to a public comment on the NPRM about children who are age 13 or older, whose impairments cannot meet but can medically equal this listing. In final listing 114.08A5, we incorporate prior listing 114.08A6 except to remove ''Other'' as a descriptor to make it consistent with the final adult listing. We replace ''acquisition'' as used in prior listing 114.08H1 with ''onset'' in final listing 114.08G1 because a sudden ''onset'' of a new learning disability is medically a more accurate description of how this neurologic abnormality would manifest in a child with HIV infection. We are also redesignating a number of listings to reflect the removal of reference listings.

Final Listing 114.10— Sjögren's Syndrome

We are adding listing 114.10 to evaluate Sjögren's syndrome in children for the same reasons we are adding a Sjögren's syndrome listing for adults in part A.

Other Changes

We are making minor conforming changes in prior 1.00B and 101.00B, and 1.00L and 101.00L to reflect changes in the final immune body system listings.

We are also making minor conforming changes in prior 8.00D3 and 108.00D3 of the skin disorders listings. We are revising these sections to indicate that we evaluate Sjögren's syndrome under the new listing for that disorder, final listings 14.10 and 114.10.

We are also making minor conforming changes in prior 13.00A and 113.00A of the malignant neoplastic diseases listings. We are revising these sections to reflect changes in final listings 14.08E and 114.08E.

Throughout these final rules, we are also making a number of minor editorial changes from the NPRM that we have not summarized above. For example, we have corrected unintentional language inconsistencies between part A and part B, changed sentences to use active voice instead of passive voice, and removed some repetitive statements and unnecessary words. None of these revisions are substantive, and they do not change the meaning of what we originally proposed in the NPRM.

Public Comments on the NPRM

In the NPRM, we published in the **Federal Register** on August 04, 2006 (71 FR 44432, corrected at 71 FR 46983), we provided the public with a 60-day comment period that ended on October 13, 2006. In addition to our notice to the public, we invited comments from national medical organizations and professionals, advocacy groups, and legal services organizations.

We received 55 comment letters. The commenters included advocacy groups, legal services organizations, State agencies that make disability determinations for us, medical organizations, and individuals, including individuals who have immune system disorders or relatives with immune system disorders. One of the comment letters reflected the comments from 40 organizations. We carefully considered all of the comments and provide our reasons for adopting or not adopting the comments in our responses below. Because some of the comments were long, we have condensed, summarized, and paraphrased them. We believe we have presented the commenters' views accurately, and have responded to all of the significant issues raised by the commenters that were within the scope of these rules.

Some commenters also wrote in about issues that were not related to the proposed rules, and in some cases not to Social Security disability benefits. Although we did read those letters, we did not respond to them.

Also, some commenters sent comments supporting the rules changes and noting provisions with which they agreed without suggestions for changes in those provisions. In most cases, we have not summarized or responded to those comments below because they do not require a response. However, we appreciate receiving them.

Use of Functional Criteria in the Immune System Disorders Listings

Comment: Several commenters supported our proposal to add functional criteria to each of the listings in this body system. However, three other commenters expressed concerns about the proposal. One commenter suggested that we should avoid introducing functional criteria into

these listings. The commenter observed that, while the consideration of functional impacts may result in greater latitude among adjudicators and more flexibility in decisionmaking, there is also an element of subjectivity that could result in greater inconsistency in our decisions. The second commenter, who generally agreed that ''functioning should be considered in ratings,'' said that the addition of functional criteria to the listings for immune system disorders other than HIV infection would not make the evaluation of these disorders any easier. This commenter said that considering functional information in claimant and third party reports of activities of daily living, and treating physician and other source statements would make evaluating these disorders more difficult. The commenter also believed that more evidence would be needed to support the decisions.

We address the third commenter's concern in the next comment and response.

Response: As we explained in the NPRM (71 FR at 44440) and earlier in this preamble, we are adding the functional criteria in response to many comments we received on the ANPRM and in public outreach meetings. As many commenters pointed out, the debilitating effects of immune system disorders are often ''invisible''; that is, outward signs of the disorders and objective severity markers often are not obvious and we cannot describe them in a listing. Because of this, the proposal received support from many individuals (or their family members) who received disability benefits only after going through a long appeals process. We also received comments about inconsistencies in our adjudications because we did not provide the kinds of guidance about evaluating the functional impact of immune system disorders that we do in these final rules.

Therefore, we do not agree with the commenters who thought that adding the functional criteria would have the negative effects they described or that we should not add functional criteria to these listings. To the contrary, we believe that these final listings will result in more consistent adjudications, and in some cases, faster adjudications, a need for less development, and fewer cases in which appeals are necessary, as we explain in more detail below.

The final listings describe individuals who are very ill. To qualify under one of these listings, an individual must first establish with objective medical evidence that he or she has the type of immune system disorder described by a given listing. Second, the individual must show that he or she repeatedly becomes ill as a result of the impairment. These two findings alone establish that the individual has a significant medical problem. The third requirement, to show a ''marked'' limitation in at least one of the areas of functioning, establishes that the overall impairment causes serious limitations.

A ''marked'' limitation as we define it is an obvious, serious limitation that affects all aspects of the individual's life (activities of daily living, social functioning) or the ability to do tasks (deficiencies in concentration, persistence, or pace). Therefore, it can be easier for an adjudicator to assess whether there is a ''marked'' limitation in an area of functioning, and to justify that assessment, than it is to assess and justify a residual functional capacity assessment. Residual functional capacity is more detailed, requiring evaluation of specific physical and mental work-related functions, what we often call a ''function-by-function'' assessment.

Because of this, without these final listings, our adjudicators would have to do more work in most, if not all, cases of individuals who have immune system disorders that will meet these final listings only to reach the same decision. Under the prior rules, virtually all of the individuals who could now qualify under the new functional listings required a residual functional capacity assessment. Our adjudicators not only had to do additional work to provide this more detailed assessment of functioning, but they also had to do the additional work associated with making findings about the ability to do past relevant work at step 4 of the sequential evaluation process, and to make an adjustment to other work at step 5. Each of these determinations—function-by-function residual functional capacity assessment, assessment of the ability to do past relevant work, and ability to make an adjustment to other work—required development of information. We believe that in some cases adjudications under these final listings will be easier, faster, and more consistent.

Finally, we have significant experience applying these and similar functional criteria in many claims. We began using these functional criteria in listing 14.08 in 1993. We used some of the same criteria to evaluate physical impairments in children when we first implemented the policy of functional equivalence for children in 1991,[2] and have used similar kinds of criteria for evaluating functional equivalence in physical impairment claims since 2000 under § 416.926a of our rules (65 FR 54747 (2000)). Many of our listings, including most of our musculoskeletal listings, several of our cardiovascular listings, and most of the neurological listings, contain functional criteria.

Comment: The third commenter (whose comment was about the functional criteria in proposed listing 14.08) suggested that limitations in maintaining social functioning and in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace are basic issues for evaluating mental impairments under 12.00, for mental disorders, and should be removed from the listing. Similarly, one of the two commenters whose comments we summarized in the preceding comment summary expressed concern that adjudicators could assume that the functional criteria in listing 14.08 pertain only to the evaluation of mental impairments because they are similar to those considered in the context of the mental listings.

Response: We do not agree that maintaining social functioning or completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace describe only mental functioning and should be removed from listing 14.08K or any of the other corresponding final listings. We addressed this issue at length in 1993 when we first published these rules. In the preamble to the 1993 publication of the rules, we explained in responding to public comments:

> We do not agree that it is inappropriate to apply these functional criteria to physical disorders because the criteria are generic; they do not describe mental functions, but broad areas of functioning that are relevant to any adult's ability to work or any child's ability to independently, appropriately and effectively engage in age-appropriate activity. * * * [T]hese activities describe what people do and how well they do it on a day-to-day basis. For our purposes, it is immaterial whether an individual has difficulty doing chores or maintaining concentration because of a mental disorder or because of fatigue, weakness, pain, headaches, frequent diarrhea, or any other physical problem; the person still has the limitation that results from a medically determinable impairment(s).

58 FR at 36040. We also explained that we had modified the language of the introductory text to make it more specific to individuals with HIV infection. Those modifications remain in these final rules with even further clarifications.

A number of commenters on the 1993 rules specifically commented that the area of social functioning is meant to measure an individual's psychiatric

[2] See generally 56 FR 5534 (1991).

condition and is not appropriate for the evaluation of HIV. We responded that:

> * * * the ability to interact with other people can be affected by a physical impairment. For instance, an individual who is fatigued may have difficulty going out or sustaining conversation. * * *

58 FR at 36041.

In addition, and as we noted in the response immediately preceding this one, over the almost 15 years since we first published listing 14.08, we have gained considerable experience applying functional criteria such as these to physical impairments.

In final 14.00I, as in the NPRM, we provide that functional limitations may result from the impact of the disorder on mental functioning, physical functioning, or both mental and physical functioning. As we indicated in the NPRM, we revised 14.00I so that it applies to all of the listed impairments and more consistently refers to symptoms that are related to physical impairments. We believe that these revisions will help our adjudicators to better understand and remember that the areas of functioning should be applied to physical, as well as mental, limitations. However, we will provide training on the new functional criteria in these final rules.

Comment: One commenter said that adjudicators will need guidance on how to determine whether to use the immune system disorders listings alone versus completing the typical full documentation required for the mental disorders listings. The commenter remarked that doing additional mental development such as obtaining a consultative examination for a mental status examination could potentially delay a claimant's determination.

Response: We agree that guidance is needed and plan to address this issue in the training that we will conduct on these final rules. We do not believe that mental consultative examinations will be required as a result of these final listings because we are not trying to document mental impairments. Rather, we are determining any functional limitations and restrictions that a person may have as a result of his or her immune system disorder(s). As we do for other impairments, such as HIV infection, we would expect adjudicators and reviewers to assess functioning by evaluating objective medical evidence and evidence from other sources as described in §§ 404.1512 and 416.912.

Comment: One commenter suggested that we provide more concrete guidance on how to evaluate the severity of limitations in activities of daily living and more structure on the application of terms such as ''moderate, marked, and extreme'' to reduce the likelihood of inconsistent interpretation of these terms.

Response: We did not adopt this comment because the application of these terms is often dependent on specific case facts, and because we believe that any additional detail would be better presented in training and other instructions. Our adjudicators have considerable experience evaluating ''marked'' and ''extreme'' limitations and have used the functional criteria in prior listing 14.08N which are similar to the criteria we include in these final rules. However, we will remind adjudicators of our guidance in these areas when we conduct training on these final rules.

Comment: One commenter referred to proposed 14.00I and said that it ''introduce[d] the concept of 'repeated manifestations accompanied by functional limitations' '' and the application of this concept to eight listings. The commenter observed that this ''new way of evaluating the impact of repetitive episodes'' was ''sound in theory'' but ''may be difficult to apply in practice'' because of the implicit need to document activities of daily living during periods sometimes well in the past. The commenter suggested that we clarify that the intent of the listings that include standards for evaluating functional limitations resulting from repeated manifestations of immune system disorders is to document functional limitations occurring in the present and does not require extensive documentation of the impact on activities of daily living during earlier episodes. The commenter indicated that evaluating the impact of repetitive episodes may be difficult because of the extended time period for which we may need to develop documentation of activities of daily living.

Response: We believe we accommodated this comment by adding language in final 14.00I3 explaining that the manifestation episodes must occur within the period covered by the claim. As we already do, for example, whenever we need to assess residual functional capacity, we will develop evidence about the individual's functioning for the entire period covered by the claim. The final rules do not impose any additional burden in that regard, as we have explained in our responses to the preceding comments.

Also, we must note that the concept of repeated manifestations accompanied by functional limitations is not new. We have used the criterion in the HIV infection listings since 1993. The innovation in these final rules is to apply the same kind of criterion to the other listed immune system disorders.

Systemic Lupus Erythematosus (SLE)

Comment: One commenter thought that the terms ''repeated,'' ''marked,'' and ''manifestation'' in the SLE listing could cause confusion for physicians and adjudicators. The commenter recommended that we clarify the definition of each term or replace the section in the SLE listing with a different rule, which the commenter also proposed. (We address the proposal to replace the SLE listing in a later comment and response.)

With regard to the term ''marked,'' the commenter believed that our proposed definition was ambiguous. The commenter suggested that we add more examples of ''marked'' and define it, giving examples of ''moderate'' for comparison. The commenter also said that physicians do not use the term ''marked'' in describing limitations resulting from SLE.

The commenter also suggested that we provide a definition of ''manifestation'' with examples because it was not defined in the proposed rule.

Response: We do not expect physicians and other medical sources to use our terminology. We only need for them to provide us with medical evidence that we will use to determine whether an individual's impairment meets the requirements of a listing. For example, a physician does not need to tell us that a flare of his or her patient's SLE was a ''manifestation,'' only report to us what occurred in medical terms, and if necessary, provide an opinion that it was related to the SLE.

Likewise, we realize that physicians may not use the term ''marked'' in describing limitations resulting from SLE. However, for the purpose of determining disability, the issue of whether an individual has a ''marked'' limitation is an administrative finding that we make based upon consideration of all relevant evidence in the individual's case record, which may include information that the treating source does not have. We only need evidence describing the individual's limitations, and we will determine whether those limitations meet our definition of ''marked.''

The definitions of the terms ''repeated'' and ''marked'' in these final rules are substantively the same as the definitions of these terms in our prior rules, and our adjudicators have been using these definitions since 1993, when we issued the prior rules. As we have already noted, we use the term ''marked'' in a number of our other rules as well.

Comment: With regard to the term ''repeated,'' the same commenter indicated that patients might not see their physicians often enough to satisfy the criterion in the proposed rule, or physicians might not record the required information in a patient's chart. The commenter said that physicians may not spend time documenting their records because of time constraints, and this would be a problem if the individual later applies for disability benefits.

Response: We understand the commenter's concern. However, such individuals with SLE can still qualify under final listing 14.02A, which does not require a showing of repeated manifestations, and in other ways; for example, with impairment manifestations that meet other listings, based on our policy of ''medical equivalence,'' or based on residual functional capacity. We address the latter issues in final 14.00G6 for individuals who have not received ongoing treatment or do not have an ongoing relationship with the medical community, and final 14.00J, for individuals whose impairments do not meet the requirements of one of these listings.

Comment: The commenter also said that the requirement for repeated manifestations did not recognize that SLE can cause permanent damage that remains chronic after the manifestations have stopped. As an example, the commenter described an individual who had a severe heart attack caused by lupus, who does not experience any new manifestations, but who is disabled from permanent heart damage.

Response: The example of an individual who has permanent, disabling heart damage that the commenter provided is an example of the principles we discussed in the response immediately above. If the heart damage is sufficiently severe, it would meet or medically equal one of our cardiac listings in 4.00, the cardiovascular body system. Even if it does not meet or medically equal a listing in the cardiovascular body system, it could be the basis for a finding of disability at the last step of the sequential evaluation process because of the functional limitations it causes.

Also, our criteria for evaluating repeated manifestations of SLE do not require repetition of the same manifestation. For example, an individual who has experienced three different manifestations of SLE (for example, heart problems, leukopenia, and pleuritis) with the frequency and duration required in final 14.00I3 would have an impairment that satisfies the criterion in final listing 14.02B. In response to this comment, we have added language to final 14.00I3 to make this clear. This is not a change in what we proposed, only a clarification of our intent.

Comment: The same commenter also suggested that we use the term ''flare'' instead of ''manifestation'' because that is the word physicians treating SLE use to describe increased symptoms and disease activity.

Response: We are aware that physicians who treat SLE often use the term ''flare'' to describe increased symptoms and disease activity. However, ''flare'' implies a temporary state, and our term ''manifestation'' does not necessarily mean that. We believe that many medical professionals who do not work for us will understand our term, but it is not critical that they do.

Comment: The same commenter provided a suggested replacement for the criteria in proposed listing 14.02B that included language such as ''severe impairment'' in one of the domains and the ''opinion'' of a specialist regarding prognosis for improvement in functional capacity. The commenter indicated that the proposed criteria were medically accurate for evaluating lupus, could be documented through a claimant's medical records, and could be easily applied by adjudicators.

Response: We did not adopt the recommendation for a number of reasons. The commenter's criteria included essentially the same criteria we had proposed. However, the commenter would have also required medical evidence that shows that treatment has not significantly reduced the severity of the disorder and is not likely to restore the capacity to work. This would have made the listing stricter than what we had proposed and stricter than the prior listing.

Comment: One commenter suggested that we add ''intense generalized muscle aches and pains'' to the constitutional symptoms and signs of severe fatigue, fever, malaise, or weight loss in proposed listing 14.02 because it is the most common symptom that rheumatologists who treat individuals with lupus hear from their patients.

Response: We agree that intense generalized muscle aches and pains is a common complaint of individuals with SLE. However, these symptoms generally respond to treatment. If the muscle aches and pains persist or do not respond to treatment, they may be the result of a secondary disorder other than SLE. Therefore, we did not adopt this comment.

Systemic Sclerosis (Scleroderma)

Comment: One commenter suggested that we should make the criterion for toe contractures in listing 14.04B1 more specific to make it more comparable with the criteria for finger contractures in proposed listing 14.04B2, atrophy of the lower extremities in proposed listing 14.04B3, and atrophy of the upper extremities in proposed listing 14.04B4. The commenter remarked that ordinary hammer toes are contractures and only the most severe result in significant incapacity.

Response: We did not adopt the comment because we believe that it is clear that listing 14.04B1 cannot be met with simple hammer toes. The listing requires that the toe contractures be so serious that they result in the inability to ambulate effectively. This is consistent with listings 14.04B2, 14.04B3, and 14.04B4, which require contractures or atrophy with irreversible damage resulting in either the inability to ambulate effectively or the inability to perform fine and gross motor movements effectively.

Comment: One commenter pointed out that our inclusion of the phrase ''or of a toe and finger'' in proposed listing 14.04C1 was redundant because we also required that the gangrene must be present in at least two extremities. The commenter said that the intent to require two extremity involvement is clear and suggested that we remove the rest of the language in proposed listing 14.04C1.

Response: We adopted the comment.

Immune Deficiency Disorders, Excluding HIV Infection

Comment: One commenter suggested that when we give examples of primary immune deficiency disorders in these proposed rules we use ''Common Variable Immunodeficiency Disorder (CVID)'' instead of the word ''agammaglobulinemia'' because it would be less confusing.

Response: We did not adopt this comment because the example we use in these rules is of ''X-linked agammaglobulinemia'' and the term CVID does not include this disorder.

Comment: One commenter suggested that we clarify what constitutes ''sepsis'' as required in proposed listing 114.07A1 for immune deficiency disorders. The commenter remarked that it is not uncommon for clinicians to inappropriately label someone as having sepsis or urosepsis when the more correct diagnosis was bacteremia with a urinary tract infection.

Response: We did not adopt this comment because we do not agree that

sepsis is commonly misdiagnosed as bacteremia. Additionally, sepsis is such a serious condition that we believe that it will be clear from the medical records when bacteremia is incorrectly labeled as sepsis.

Human Immunodeficiency Virus (HIV) Infection

General

Comment: Many commenters suggested that the final rules should include enough general language to accommodate the inevitable changes in understanding and treatment of HIV infection that will occur during the anticipated 8-year life of the rules. The commenters believed that we would unfairly deny individuals if we did not include such general language and if the individuals' medical records did not include the clinical markers required by these listings. The commenters recommended that we add a criterion for ''an infection that is systemic or disseminated'' to listings 14.08A through F in recognition of these anticipated changes. The commenters also suggested that the rules should accurately and comprehensively reflect the current understanding of HIV disease and treatment.

Response: The final rules, like the prior rules, do include general language that will allow our adjudicators to establish the existence of HIV infection and identify manifestations of HIV infection based on future advances in medicine and changes in medical science.

• With regard to definitive diagnosis of HIV infection, we include in final 14.00F1a(vi) a catchall criterion for ''[o]ther tests that are highly specific for detection of HIV and that are consistent with the prevailing state of medical knowledge.'' This criterion is similar to prior 14.00D3a(iii), and we include it specifically to allow for future advances or changes in the methods for diagnosing HIV infection.

• Likewise, as in 14.00D3b of the prior rules, we include in final 14.00F1b a provision that allows our adjudicators to document HIV infection ''without the definitive laboratory evidence described in 14.00F1a, provided that such documentation is consistent with the prevailing state of medical knowledge and clinical practice and is consistent with the other evidence in [the individual's] case record.'' This permits our adjudicators to establish the existence of HIV infection based on current prevailing medical practice and even in the absence of laboratory testing. (For an additional explanation of this provision when we originally published it in 1993, see 58 FR at 36019 and 36033.)

• With regard to the manifestations of HIV infection, the language in these final rules is general. For example, final 14.00F3a requires only definitive documentation ''by culture, serologic test, or microscopic examination of biopsied tissue or other material.'' Final 14.00F3b contains virtually the same language as in final 14.00F1b regarding other acceptable documentation of the manifestations of HIV infection.

Additionally, we did not add the recommended listing criterion for two reasons. First, the listings are only examples of impairments that we consider severe enough to prevent any gainful activity and are not meant to be an all-inclusive list of such impairments. If an individual with HIV infection has an opportunistic disease or other condition that is not listed, we will consider whether it medically equals any listing; that is, whether it is as medically severe as an impairment in the listings. Second, if we added the language proposed by the commenters we might inadvertently include some persons who do not have listing-level impairments.

It is also important to remember that we do not deny benefits to anyone simply because his or her impairment(s) does not meet or medically equal the severity of a listing. We may still find such an individual disabled based on other rules in the appropriate sequential evaluation process for adults or children.

We do, however, agree that the listings should reflect the latest medical knowledge of HIV infection. As noted earlier, we are publishing separately an ANPRM in today's edition of the **Federal Register** inviting comments and suggestions on how to update and revise our listings for HIV infection. We believe that we need additional information before considering whether to propose additional changes to the criteria in the HIV infection listings.

Comment: Many commenters suggested that we add guidance to acknowledge that disability may result from conditions that are not specified in these final listings or that may emerge as a result of new or sustained HIV treatment by adding the following guidance: ''Special consideration should be given to other conditions, signs and symptoms deemed by the primary care provider as contributing to substantial functional limitations.''

Response: We did not adopt these comments. The final listing—like the prior listings—already allows for the consideration of conditions that are not specified and that may arise in the future. The opening paragraph of final 14.08K explains that HIV manifestations considered under this listing can be the manifestations listed in 14.08A–J ''or other manifestations,'' and then provides a parenthetical list of examples of such other manifestations. Since the parenthetical list says ''for example,'' the listing does include any other manifestations of HIV infection, including new manifestations that may arise in the future. The nature of the manifestation is less important than the fact that the individual repeatedly experiences them.

We did not include the phrase ''deemed by the primary care provider as contributing to substantial functional limitations'' because the statement is not an accurate characterization of how we determine the existence and severity of impairments, impairment manifestations, and functional limitations, or of how we consider medical opinions from treating sources. We have other, general rules that explain these policies, and it would not be appropriate to repeat them in a listing.

Also, if a new manifestation should arise in the coming years, we will still be able to tell our adjudicators about it through internal guidelines we can issue. We can also provide training if necessary.

Comment: Many commenters suggested that these rules should address the interplay between HIV and mental health. The commenters said that the rules should recognize that mental health conditions can be a manifestation of HIV infection which, even if they do not meet or medically equal mental disorders listings, should be considered as repeated manifestations of HIV infection. They also said that the rules should indicate that attention must be paid to the signs and limitations that stem from mental and emotional deficits when evaluating the severity and level of progression of HIV disease.

Many commenters remarked that HIV medications can themselves cause mental impairments, such as significant memory loss, cognitive deficits, depression, anxiety, paranoia, and hypervigilance. These commenters also indicated that mental illness may become more pronounced as the HIV disease progresses and can interfere with self-care, activities of daily living, and adherence to treatment regimens and appointment schedules. The commenters suggested that primary care providers and infectious disease specialists may prescribe compensatory medications, such as anti-depressants and anti-anxiety medication, to their

patients without referring them for psychiatric care or counseling. They said that, in such cases, there will be no longitudinal history of psychiatric care or assessment, but that we should recognize these manifestations of HIV infection which contribute to the disabling nature of the disease. The commenters suggested that we add another subsection to final 14.00F to make these points and that we revise listings 14.08K and 114.08L to recognize specifically that mental health conditions can be a manifestation of HIV infection that can be considered under those listings.

Response: We did not agree with these comments, but we clarified a phrase in the final rules in response to them. The proposed rules did, and these final rules do, recognize the interplay between HIV infection and mental health, and that mental health conditions can be manifestations of HIV infection. While we did indicate in proposed 14.00J2 that individuals with immune system disorders ''including HIV infection'' may manifest signs or symptoms of a mental impairment that could be evaluated under the mental disorders listings, we also made provision throughout the immune system disorders listings for individuals whose mental impairments would not meet or medically equal a mental disorders listing, and recognized that mental limitations could result from HIV infection or its treatment.

First and foremost, we included ''cognitive or other mental impairment'' as an example of a manifestation of HIV infection that would satisfy the requirement for repeated manifestations in proposed listing 14.08K. We also provided in proposed 14.00G1, 14.00G5, and their corresponding childhood sections that limitations in mental functioning can be a side effect of treatment for immune system disorders, while in proposed 14.00I4 and 114.00I3 we indicated that mental limitations can result from the impact of the disease process itself. All of these provisions are in the final rules.

We did not add some of the other information the commenters suggested because we believe that it is too detailed for inclusion in our listings, and some of the proposals also would apply to our evaluation of other immune system disorders as well as HIV infection. However, we will consider including this guidance in the training we provide for our adjudicators on these listings.

However, in response to these comments, we changed the phrase ''cognitive or other mental impairment'' in proposed 14.08K to ''cognitive or other mental limitation'' in final 14.08K. This should help to clarify that we will consider cognitive or other mental limitations as manifestations under this listing regardless of whether the existence of a ''mental impairment'' (that is, a mental condition) has been established.

Comment: Many commenters suggested that we make it clear throughout the proposed rules that each claimant is entitled to an individualized assessment of his or her HIV infection.

Response: We did not make any changes in response to this comment. The commenters did not provide examples of sections of the rules that they thought should be improved and did not recommend specific revisions, and we believe these final rules do make clear that we require an individualized assessment of an individual's HIV infection or any other immune system disorder. For example, the rules stress the importance of considering the individual's symptoms and limitations caused by the disease or its treatment. Also, individualized assessment is a general principle that applies throughout all of our disability rules.

Comment: Two commenters questioned our decision to not make any substantive changes to the proposed HIV infection listings that require HIV infection and certain opportunistic infections, such as the listing for PCP. The commenters indicated that there have been advances in the understanding and treatment of HIV infections since these listings were originally published. One commenter remarked that the widespread availability of highly active antiretroviral therapy (HAART) has changed the occurrence and progression of complications of HIV infection and that scientific advances have permitted the dosing of much fewer pills than previously required. Other commenters, including a medical association representing HIV medical providers, supported our decision not to change the stand-alone listings contained in listing 14.08.

Response: As noted in the NPRM, we carefully considered the advances in treatment and consequent increases in longevity that have occurred since we published the prior rules in 1993. Based on this review, we did not believe that there had been sufficient progress in the treatment and control of HIV infection to warrant any change in these rules at that time. However, as a result of public comments on the NPRM, we now believe that some changes may be appropriate. Therefore, as noted above, we are publishing separately an ANPRM in today's edition of the **Federal Register** inviting comments and suggestions on how we might update and revise our listings for HIV infection. We will consider the comments and suggestions that we receive in response to the ANPRM, as well as our adjudicative experience and additional information about advances in medical knowledge, treatment, and methods of evaluating HIV infection. If we determine that listing 14.08 should be further revised, we will publish for public comment an NPRM that will propose specific revisions to the listing.

Comment: Three commenters suggested that there should be a time period for reviewing claims allowed under proposed listing 14.08, such as a period of 12 months or 3 years, similar to the time period we have in some other listings, such as organ transplants and malignant neoplastic diseases.

Response: We did not adopt this comment. The disease process for HIV infection is not the same as it is for disorders such as organ transplants or malignant neoplastic diseases, and we do not believe the use of timeframes for the HIV infection listings would be appropriate at this time.

Manifestations of HIV Infection

Comment: One commenter suggested, without explanation, that we modify the criteria in proposed listing 14.08A1 by eliminating the requirement that pulmonary tuberculosis be ''resistant to treatment.''

Response: We did not adopt this comment. We added pulmonary tuberculosis resistant to treatment in 1993 in response to public comments. (58 FR at 36021) We are unaware of changes in medical science or treatment since then that would indicate that we should consider pulmonary tuberculosis that is responsive to treatment to be of listing-level severity, and the commenter did not provide a reason for the recommendation.

Comment: One commenter suggested that we include esophageal candidiasis in the examples of those conditions in final 14.00F3b for which a presumptive diagnosis can be made. The commenter indicated that, like PCP, CMV diseases, and toxoplasmosis of the brain, esophageal candidiasis is typically diagnosed based on clinical manifestations, history, and treatment response, and that when it is, it will meet listing 14.08B2. Another commenter made a similar comment and suggested that we include information about medical and other evidence that could be used to presumptively diagnose *Candida* esophagitis, similar to the guidance in 14.00F3b(i) for PCP. This commenter suggested that such guidance would

remind our adjudicators that a diagnosis of ''*Candida* esophagitis'' without supporting medical evidence is insufficient to meet or medically equal listing 14.08B2.

Response: We adopted these comments by adding new paragraphs 14.00F3b(iv) and 114.00F3b(iv). They describe other acceptable evidence that we may use to document the presence of candidiasis of the esophagus, also known as *Candida* esophagitis. We agree with the first commenter that presumptively diagnosed *Candida* of the esophagus meets the requirements of the listing. We also agree with the second commenter that a diagnosis alone is not sufficient to establish disability under the listing; we must have medical evidence to support the diagnosis. We did not state this in the new paragraph because it is a basic principle in our disability programs, applicable to any impairment.

In the new paragraphs, we provide guidance indicating that typical treatment response ''can be supportive of the diagnosis,'' consistent with the first commenter's recommendation. For consistency, we added the same guidance in final 14.00F3b(i) and 114.00F3b(i) in the statement about treatment response for PCP.

Comment: One commenter suggested that the guidance in proposed 14.00F3b(i) for documenting the diagnosis of PCP without definitive laboratory evidence was questionable and insufficient. The commenter remarked that the diagnosis of PCP should be documented on the basis of prevailing and accepted medical knowledge, and that the discussion in this proposed section should otherwise be deleted.

Response: We did not agree with this comment. The criteria we included in the NPRM and these final rules are appropriate examples of medically accepted supportive evidence of PCP infection.[3] However, in response to this comment we are adding ''no evidence of bacterial pneumonia'' in final 14.00F3b(i) and 114.00F3b(i) as another piece of supportive evidence that may be used to diagnose PCP presumptively.

Comment: One commenter suggested that we change the reference to ''*Pneumocystis carinii* pneumonia (PCP)'' in proposed 14.00F1b to ''*PneumoCystis* Pneumonia (PCP) caused by infection with *Pneumocystis jiroveci*'' to be more consistent with prevailing medical knowledge. The commenter also suggested that we change the criteria of ''*Pneumocystis carinii (jiroveci)* pneumonia or extrapulmonary *pneumocystis carinii* (*jiroveci*) infection'' in proposed listing 14.08B7 to ''*PneumoCystis* Pneumonia (PCP) or extrapulmonary *pneumocystis* infection caused by *Pneumocystis jiroveci.*''

Response: We partially adopted the comment. In final 14.00F1b and final listing 14.08B7, we now refer to ''*Pneumocystis* pneumonia (PCP)'' to reflect current medical terminology. Because of this change, we also removed the note we had proposed to include in 14.00F3b(i) which explained that *''Pneumocystis carinii''* is now known as *''Pneumocystis jiroveci''* and that ''PCP'' remains in common usage for the pneumonia caused by this organism. We no longer need the note because we no longer refer to *Pneumocystis carinii* or *Pneumocystis jiroveci* in these rules. We also made corresponding changes in the childhood introductory text.

Comment: One commenter suggested that we include an authoritative source for moving prior listing 14.08B7 for PCP from the section of the listings for protozoan and helminthic infections to the section of the listings for fungal infections.

Response: When we published the NPRM, we listed the references that we consulted when we were developing the proposed rules (71 FR at 44448). This list included ''Medical Management of HIV Infection'' (Johns Hopkins University 2003) by J.G. Bartlett and J.E. Gallant, which classifies *Pneumocystis carinii* as a fungal infection.

Comment: One commenter suggested that we modify the language in the next to the last sentence in proposed 14.00F3b(ii) to clarify that we do not require the presence of all of the signs noted in this sentence to support a presumptive diagnosis of *Cytomegalovirus* by indicating that the supporting evidence ''may'' include the findings we listed.

Response: We adopted the comment. As we noted in the summary of the final rules earlier in this preamble, we are also adding the word ''may'' in final 14.00F3b(i), for PCP, to be consistent with this change.

Comment: One commenter suggested that we clarify whether the intent of proposed listing 14.08E4, for squamous cell carcinoma of the anus, was to include both anal canal cancers and anal margin tumors or to limit the listing solely to anal canal cancers (developing from mucosa).

Response: We adopted the comment by changing the criterion to ''Squamous cell carcinoma of the anal canal or anal margin'' in final 14.08E4 and 114.08E4. This is not a substantive change, but only clarifies our intent.

Comment: Many commenters said that we should revise the criteria in proposed listing 14.08H for evaluating HIV wasting syndrome to reflect more current medical knowledge about this condition. They said that we should provide that body mass index (BMI) and body cell mass (BCM) can be relied upon as accurate indicators of the severity of wasting in a given individual. They also said that this listing is too restrictive in its documentation requirements, and that involuntary weight loss as low as 5 percent has been associated with increased risk of death. Another commenter suggested that we revise the criteria for this listing to ''HIV wasting syndrome, characterized by involuntary weight loss of 5 percent or more below ideal body weight within six months and, in the absence of concurrent illness that could explain the findings.'' The commenter said that this would reflect medical guidelines for diagnosing the condition and the significance of rapid, unintentional weight loss.

Most of the commenters also said that the prior requirements for diarrhea were too restrictive because a person with HIV infection who experiences wasting is functionally unable to work if he or she experiences diarrhea for 2 weeks and protein deficiency. They also said that, although a documented fever is a useful clinical indicator of wasting syndrome, the listing should not require the individual to have ''many temperature readings throughout a month or for a longer period.'' They said that HIV wasting syndrome can be disabling even in the absence of the listing requirement when it is accompanied by constitutional symptoms, such as weakness, lack of muscle strength, fatigue, malaise, or inability to lift. They suggested that as an alternative to evidence of diarrhea or fever, the listing could contain language comparable to that in proposed 14.00F; that is, ''documented by other generally acceptable methods consistent with the prevailing state of medical knowledge or clinical practice.''

Response: We agreed with the commenters who suggested that we include a reference to BMI in the listing, and have clarified final listing 14.08H by explaining that we can compute the 10 percent loss of weight in pounds, kilograms, or by BMI. We did not add a reference to BCM because BCM is more of a research concept, involves calculations of body composition, and is not in wide usage in the general medical community.

[3] See *Cecil Textbook of Medicine* at 2059–2064 (Lee Goldman and Dennis Ausiello, eds.22nd ed., 2004).

We also added guidance in final 14.00F5 to remind adjudicators that they can evaluate HIV infection that affects the digestive system and results in malnutrition under listing 5.08. Even though there is no listing for ''wasting syndrome'' in part B, there is a criterion in final listing 114.08H3, the growth disturbance listing, for a loss of 10 percent of body weight. We have added the same statement about pounds, kilograms, and BMI in that final rule as well, and a statement referring to listing 105.08 in the digestive system at the end of final 114.00F4a.

We did not make other changes in these final listings in response to the comments. We use listings to find individuals whose impairments are so severe that we do not need to consider their age, education, and previous work experience to decide that they are disabled. We believe that, while some individuals with the findings recommended by the commenters will be disabled under our rules, and some will be at risk of dying, others will not, so we cannot presume disability based on those findings in all, or even most, individuals. Even if they are initially unable to work, we believe that many individuals with the findings suggested by the commenters will not have impairments that meet the duration requirement in the Act and our regulations, that is, have an impairment that is expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months.

However, some individuals with a 5 percent weight loss will have impairments that meet the requirements of listing 14.08H; in some individuals, a 5 percent weight loss will be a ''significant involuntary weight loss.'' As we explain in final 14.00F5, final listing 14.08H does not require a specific minimum amount or percentage of weight loss. We always consider an involuntary weight loss of at least 10 percent of baseline ''significant,'' but an involuntary weight loss of less than 10 percent may also be ''significant'' depending on the individual's baseline weight and body habitus. We also provide examples in final 14.00F5 of when weight loss of less than 10 percent of body weight may and may not be significant.

Likewise, although we agree that an individual with HIV infection who experiences diarrhea for 2 weeks with protein deficiency would have work-related limitations, and may be unable to work for a time, we do not believe that this finding by itself would necessarily be indicative of an impairment that would be expected to result in death or prevent the ability to work for a continuous period of at least 12 months. We must consider the specific facts of such individuals' cases to decide whether they are disabled.

With regard to the comment about fever, we did not include a requirement in the prior rule or proposed rule, nor do we include one in the final rule, for the number of times during the course of a month in which the individual's temperature must be taken. We must only have sufficient information to determine that the individual has had a persistent fever throughout most of a month. More importantly, the criterion for fever in final listing 14.08H2 is only one of two criteria in listing 14.08H by which an individual may qualify, so an individual could qualify under this listing without fever. We believe that the fever criterion is medically supportable as an indicator of an HIV infection of listing-level severity when considered in the context of the other criteria of involuntary weight loss and chronic weakness. Also, an individual with wasting syndrome could qualify without a finding of fever and with the kinds of constitutional symptoms and signs suggested by the commenters under final listing 14.08K.

We also did not add language that is comparable to that in proposed 14.00F as an alternative to the evidence of diarrhea or fever because the criteria in final listings 14.08H1 and 14.08H2 are severity criteria. The language proposed by the commenters would only help to establish the diagnosis of wasting syndrome and would not be sufficient to establish severity or duration under the listings.

However, as we noted earlier, we are publishing separately an ANPRM in today's edition of the **Federal Register** inviting comments and suggestions on how we might update and revise our listings for HIV infection. We believe that we need additional information before determining whether to propose any substantive changes to the criteria in the HIV infection listings.

Comment: Many commenters said that we should modify proposed listing 14.08I to reflect current medical views regarding diarrhea and its treatment. They said that many patients with disabling diarrhea do not require hydration and therefore are not treated with intravenous hydration, and that ''tube feeding'' is rarely used now to treat diarrhea.

The commenters said that diarrhea can rise to the level of being disabling without the objective findings in proposed listing 14.08I. They suggested that this listing should include individuals who have multiple loose stools each day, bowel incontinence, or a combination of the two, despite modifications in HAART and antidiarrheals. They also suggested that we should allow documentation by other objective evidence, such as reports of a rectal examination, stool culture, or fecal occult blood test. Finally, they recommended that we add language comparable to that in proposed 14.00F; that is, ''documented by other generally acceptable methods consistent with the prevailing state of medical knowledge or clinical practice.''

Response: We did not adopt the comments in these final rules. While we agree that many individuals with chronic diarrhea do not need hydration and that tube feeding is rare, these criteria provide some objective verification of the chronicity and severity of the diarrhea and our adjudicative experience shows that individuals do qualify based on the criteria. We did not adopt the criteria the commenters proposed because we believe that they are not sufficient to reliably document the severity, frequency, and chronicity of the diarrhea for our disability evaluation purposes. We also believe that the other objective evidence the commenters proposed (that is, rectal examination, stool culture, and fecal occult blood testing) would not be sufficient for this purpose. Lastly, we did not adopt the comment asking us to add language to proposed 14.00F because it would only help to establish the existence of the impairment, not its frequency and chronicity.

Comment: One commenter suggested that we should characterize the symptom of ''fatigue'' in listing 14.08K as ''severe fatigue'' to reflect a symptom at listing-level severity and to be consistent with the other immune system disorders listings.

Response: We adopted the comment. The change is not substantive, but only a clarification. Like the prior rule and the proposed rule, the final rule specifies that the symptoms listed must be ''significant.'' Therefore, adding ''severe'' does not change its meaning. For consistency, we added the word ''severe'' before the word ''fatigue'' throughout these final rules.

Comment: One commenter asked why we limited proposed listing 114.08A4 to children less than 13 years of age, particularly when proposed 114.00F4c said that children age 13 and older may have an impairment that medically equals this listing. The commenter noted that there is nothing in the listing to alert one to the possibility of a medical equals for older children.

Response: We partially adopted the comment. The age 13 cutoff has been in this listing since we first published it in 1993. When we first published it, we explained in the preamble to the regulations that these types of infections are more serious and more indicative of a rapid decline in younger children, that we had considered a younger age cutoff, but that we decided on age 13 as a medically appropriate dividing line. See 58 FR at 36047.

The impact of pyogenic bacterial infections in children who are under the age of 13 is usually more harmful than in older children, and there is general medical acceptance for evaluating the severity of these infections differently depending on the age of the child. Therefore, we did not change the age requirement in this listing. However, in response to this comment, we added a reference to 114.00F4c in final listing 114.08A4 to remind adjudicators that children age 13 and older may medically equal this listing.

Suggested Additional Criteria for the Listing for HIV Infection

Comment: One commenter suggested that we ''acknowledge'' in final 14.00F2 that a CD4 count of 100 or less would document the severity or functional limitations of HIV infection and establish disability. The commenter remarked that the CDC classifies a person with HIV and a T–cell (CD4) count below 200 as having AIDS and that the susceptibility to illness for such individuals increases dramatically. The commenter also indicated that a person with HIV and a CD4 count below 100 is likely to exhibit an extreme susceptibility to opportunistic infections and disabling illnesses, have difficulty tolerating medication, experience graver physical conditions, and exhibit lower functional capacities than individuals with stronger immune responses.

Response: We did not adopt this comment. We agree that a CD4 count of 100 or less indicates an increased susceptibility to developing opportunistic infections and is an important finding when considering treatment options. However, we do not agree that CD4 counts are a good indicator of disability. We continue to have the same opinion we had when we published the prior rules in 1993. In the preamble to those rules, we explained that:

> while a low CD4 count (and especially a rapidly declining CD4 count) is an indicator of a compromised immune system and a valuable tool for determining when to institute prophylactic treatment, there is no consistent correlation between a given CD4 count and how or whether an individual is functionally impaired by HIV infection. Individuals with high CD4 counts may be quite severely limited, while others with very low counts may be able to continue normal activities. One individual who commented on our proposed rules related his own story of living with HIV infection, noting that he continued to feel well and to work until his CD4 count was well below 100. He argued that to base our rules on such an unreliable indicator would be to unfairly stigmatize individuals who are able to function well despite low CD4 counts.

58 FR at 36018.[4]

There have been significant advances in treatment and monitoring of individuals with HIV infection since we published the prior rules in 1993. Therefore, we believe that what we said in 1993 is, if anything, even more relevant to our disability adjudications today.

Comment: One commenter suggested, without explanation, that we add ''Rhodococcus'' to the criteria of listing 14.08A for bacterial infections, ''Blastomycosis'' and ''Penicillium marneffei'' to the criteria of listing 14.08B for fungal infections, and ''Leishmaniasis'' and ''Microsporidiosis'' to listing 14.08C (protozoan or helminthic infections).

Response: We did not adopt these comments. We did include ''microsporidiosis'' in proposed, now final, listings 14.08C1 and 114.08C1; it was also in prior listings 14.08C1 and 114.08C1. We did not add the other suggested manifestations because the listings are only examples of impairments that we consider severe enough to prevent any gainful activity and are not meant to be all-inclusive. Also, if an individual with HIV infection has an opportunistic disease or other condition that is not listed, we will consider whether it medically equals a listing.

Comment: Many commenters suggested that the criteria in proposed listing 14.08D, for viral infections, should include individuals who have both HIV infection and hepatitis B or hepatitis C under listing 14.08D. The commenters said that individuals who are infected with both HIV and hepatitis are more prone to illness, more difficult to treat, and less able to function than individuals who are only infected with a hepatitis virus. They also indicated that co-infection with HIV and hepatitis B or C complicates the treatment of both conditions.

Response: We did not adopt this comment. While we agree that co-infection with HIV infection and hepatitis B or C may complicate the treatment of these conditions, increase susceptibility to illness, and impact functioning, we also believe that the severity of the co-infection will vary from individual to individual and may not result in disability. Because of this, we believe that each claim involving this co-infection must be evaluated on a case-by-case basis. This includes evaluating whether the co-infection results in manifestations that would satisfy the criteria in final listings 14.08K or 114.08L.

However, we do provide in final 14.00G1f and 114.00G1f that the interactive and cumulative effects of treatments for co-occurring impairments, such as treatment for HIV infection and hepatitis C, may be greater than the effects of each treatment considered separately.

Comment: Many commenters said that we should add a stand-alone listing for chronic or severe acute pancreatitis under proposed listing 14.08. The commenters indicated that pancreatitis is frequently associated with HIV infection, can be caused by HIV infection or medications used to treat HIV infection, and may severely impair an individual's ability to function. They also said that pancreatitis can cause severe and recurring manifestations, such as abdominal pain, nausea, vomiting, fever, chills, and shortness of breath, that can result in a hospital admission for 2 or 3 weeks at a time or in profound weight loss and long-term food intolerance.

One commenter suggested that we specify under this listing that an individual with HIV infection is disabled if he or she requires hospitalization for pancreatitis twice in a 1-year period. Other commenters suggested that we include a listing that is satisfied by evidence of one or more episodes of pancreatitis from which clinical recovery is incomplete after 6 months and is accompanied with disabling symptoms such as, but not limited to, abdominal pain, diarrhea, significant weight loss, nausea, anorexia, and glucose intolerance requiring frequent monitoring or treatment.

Response: We did not adopt the comments. Generally, pancreatitis in individuals with HIV infection is caused by HAART and is acute; the pancreatitis usually resolves after HAART is suspended briefly. Because of this, it would not be appropriate to add a stand-alone listing for episodes of pancreatitis or the other criteria recommended by the commenters. The criteria recommended by the

[4] See also 58 FR at 36038, where we provided the same information in our response to the public comments about this issue.

commenters would not necessarily result in the inability to do any gainful activity for a continuous period of at least 12 months as required by the Act.

However, individuals with pancreatitis can qualify under these listings. As we did in the NPRM, we include pancreatitis as an example of an ''other manifestation'' under final listing 14.08K. (We do not refer to it in 114.08L because pancreatitis is not as frequent a problem in children as it is in adults. However, since the list of other manifestations is only a list of examples, pancreatitis is still included.) Many individuals who experience pancreatitis with the significant accompanying problems described by the commenters will also have serious functional limitations and will be able to qualify under final listing 14.08K. Individuals with problems such as profound weight loss with prolonged food intolerance may have impairments that meet or medically equal the requirements of other HIV infection listings or listings in other body systems; for example, listings 5.08 and 105.08 for weight loss. We may also find that they qualify based on an individualized assessment of residual functional capacity if there is an inability to work or, for children, functional equivalence.

Effects of Treatment for HIV Infection

Comment: Many commenters suggested that in proposed 14.00G5 and 114.00G5 we should directly address the issue of a claimant's non-responsiveness to HIV treatments and specifically state that the mere fact that an individual fails to respond to HAART does not indicate that he or she is not disabled or is not credible. They also suggested that we add a subsection addressing the fragility of persons who do not respond to prescribed treatment and the impact of reduced treatment options on them. The commenters noted that we addressed these issues in the ''general section'' on response to treatment (that is, 14.00G2 and 114.00G2) but thought that we should address these issues specifically for HIV infection in 14.00G5 and 114.00G5.

Response: We did not adopt these comments. As the commenters noted, we provide guidance in 14.00G2 and 114.00G2 that response to treatment and adverse or beneficial consequences of treatment may vary widely. These sections explain that we consider a variety of factors when evaluating response to treatment, including the limited number of drug combinations that may be available for treatment, and that we must consider the effects of treatment on an individual basis. We also provide a specific example of an individual with HIV infection whose impairment does not respond to antibiotics or who develops a resistance to treatment that had worked in the past.

We included this new guidance in our rules to address the major issues that are raised in these comments, and we believe that it will help to respond to the concerns that the commenters raised, not only for individuals who have HIV infection but for individuals with other kinds of immune system disorders who experience the same kinds of problems. Therefore, we do not believe that there is a need to repeat this guidance specifically for HIV infection in final 14.00G5 and 114.00G5 at this time.

Comment: Many commenters suggested that we revise proposed 14.00G5 to address the difficulty of adhering to HIV treatment regimens, and to acknowledge that there are many valid reasons why individuals with HIV infection do not strictly adhere to their prescribed treatment regimens. They also suggested that the rules state that a claimant's admitted lack of adherence to HAART should neither reflect on the claimant's credibility nor indicate that his or her functional capacity is ''artificially low.'' They indicated that claimants should not be penalized for their failure to adhere to complicated medication regimens.

Response: We partially adopted the comment. We agree that some individuals may have difficulty adhering to their treatment regimens for HIV infection, such as HAART, and that there may be valid reasons for their lack of adherence, such as side effects of treatment (for example, diarrhea, nausea, vomiting, neuropathy, or severe fatigue). We addressed this in proposed, now final, 14.00G to an extent, especially in 14.00G1 and 14.00G2, in which we provided a list of things that we consider when we evaluate the effects of treatment. We also have other rules that tell our adjudicators not to make the kinds of presumptions that concerned the commenters. For example, our regulations on evaluating residual functional capacity, §§ 404.1545 and 416.945, provide that adjudicators must consider all relevant evidence in determining a person's functional abilities; this means that they cannot draw conclusions only from the fact that an individual is not receiving or following treatment. In Social Security Ruling (SSR) 96–7p, we provide that, when we consider treatment in assessing an individual's statements about symptoms, ''adjudicator[s] must not draw any inferences about an individual's symptoms and their functional effects from a failure to seek or pursue regular medical treatment without first considering any explanations that the individual may provide, or other information in the case record, that may explain infrequent or irregular medical visits or failure to seek medical treatment.'' One of the examples of a good explanation that we provide in the SSR is ''[t]he individual may not take prescription medication because the side effects are less tolerable than the symptoms.'' [5]

However, in response to this comment, we added a sentence to final 14.00H and 114.00H that is based on the sentence from SSR 96–7p quoted above. We chose this section for the new sentence because we believe that the issue that concerned the commenters will arise most often when we are evaluating symptoms and their functional effects. We did not add the more detailed information the commenters asked us to include because we determined that it would be too extensive to include in the final listing. However, we will address the issue in training and consider whether to provide written guidance in our internal instructions as well.

Comment: One commenter suggested that we expand proposed 14.00G5a to discuss the disfiguring aspects of treatment as an adverse effect of treatment. The commenter remarked that adverse reactions to treatment, such as ''buffalo hump'' and other fat redistribution can have a significant impact on the ability of a claimant who is HIV positive to function physically, as well as on his or her emotional well-being.

Response: We partially adopted this comment. We added a parenthetical statement in final 14.00G5a and 114.00G5a to clarify that ''lipodystrophy'' means fat redistribution. We also cite ''buffalo hump'' as an example of fat redistribution.

In addressing this comment, we also noticed that in the last sentence of the paragraph, where we referred to limitations from HIV infection, we mentioned only limitations that result from symptoms. Since the objective effects of HIV infection can also cause limitations, we expanded this sentence to include ''signs'' of HIV infection. We do not believe other changes are needed because the sentence also refers to the

[5] See ''Titles II and XVI: Evaluation of Symptoms in Disability Claims: Assessing the Credibility of an Individual's Statements,'' 61 FR 34483 (1996). Also available at: *http://www.socialsecurity.gov/OP_Home/rulings/di/01/SSR96-07-di-01.html.*

side effects of treatment, which includes ''buffalo hump.''

Inflammatory Arthritis

Comment: One commenter recognized that we had removed reference listings and that we provided guidance for using appropriate listings in the introductory text. Nevertheless, the commenter suggested that in listing 14.09 we refer adjudicators to listings 1.02 and 1.03 when involvement of only one major lower extremity joint results in ineffective ambulation.

Response: We adopted the comment by revising the listing so that it is no longer necessary for adjudicators to refer to listing 1.02 or 1.03. As a consequence of this change, we also removed proposed 14.00D6e(iv) and 14.00D6e(v).

The commenter was referring to an anomaly in our prior rules. Like the prior listing, proposed listing 14.09A required inflammatory arthritis with involvement of two or more peripheral weight-bearing joints that resulted in an inability to ambulate effectively. However, some individuals who have involvement of only one major peripheral weight-bearing joint have an inability to ambulate effectively. Under the proposed listing and our prior rules, these individuals qualified under listing 1.02 in the musculoskeletal system, which specifies that the listing is met with ''involvement of one major peripheral weight-bearing joint.'' In reviewing this comment, we determined that it would be simpler if we included a provision similar to that in listing 1.02 under listing 14.09A. This inclusion allows our adjudicators to use the inflammatory arthritis listing for all individuals who have inflammatory arthritis that results in an inability to ambulate effectively.

Likewise, the proposed rules and our prior rules made a distinction between individuals with inflammatory arthritis who had persistent deformity without ongoing inflammation (evaluated under listing 1.02) and those who had ongoing inflammation (evaluated under prior listing 14.09). In reviewing the proposed rules in light of the comment letter, we realized that there is no practical reason to maintain that distinction.

We also realized that there was no reason to maintain the guidance in the prior and proposed rules that required the use of listing 1.03 when there had been reconstructive surgery. Final listing 14.09A1 is sufficient to cover the situation described in listing 1.03 for individuals with inflammatory arthritis who have had reconstructive surgery of a major peripheral weight-bearing joint and have been unable to ambulate effectively for at least 12 months or can be expected to be unable to ambulate effectively for at least 12 months.

As already noted in the summary of the changes in these rules, we revised the second sentence in 1.00B1, in the introductory text of the musculoskeletal system listings, to reflect these changes. We also made corresponding changes in part B of the listings, in 101.00B, 114.00D6, and 114.09A.

Comment: One commenter suggested that the term ''dorsolumbar'' ankylosis in proposed listing 14.09C should indicate that ''dorsolumbar'' means dorsal and lumbar, not either one.

Response: We did not adopt the comment. The term ''dorsolumbar'' is a common medical term that is generally recognized to mean the area of the spine relating to the lower thoracic and upper lumbar vertebral region of the back. We used this term in prior listing 14.09B2 (final listing 14.09C1), and we are not aware that it caused any confusion. However, we will reinforce the definition when we conduct training on these final rules.

Other Disorders

Comment: One commenter noted that in proposed 14.00D6c(v) we mentioned Lyme disease only by name and only as an impairment that we evaluate under listing 14.09 for inflammatory arthritis. The commenter said that the symptoms of Lyme disease are the same as for SLE, and suggested that we provide criteria for evaluating the disorder similar to the criteria for SLE and Sjögren's syndrome. The commenter also noted that Lyme disease with co-infections can be fatal.

This commenter and a second commenter noted that, like other immune system disorders, the symptoms of Lyme disease can be ''invisible,'' making it difficult to evaluate disability. One of the commenters suggested that we should not focus on the name of the disease but on its effects and made recommendations for how we could better adjudicate cases; for example, by giving more weight to reports from treating physicians. This commenter also noted that the symptoms of the impairment can improve at times but that we should not assume that an individual is not disabled just because he or she is able to function well for a short period. Both commenters also described difficulties in our adjudication system.

Response: We agree with the commenters that some individuals with Lyme disease have symptoms that are the same as or similar to the symptoms of SLE, Sjögren's syndrome, and other immune system disorders we include in these listings. However, there are hundreds of disorders that affect the immune system, and we are not able to list all of them in our listing of impairments. In proposed (now final) 14.00D6c, we included Lyme disease as an example of a disorder that could cause inflammatory arthritis because that is the most frequent disabling outcome of Lyme disease.

Some individuals with disabling Lyme disease will have impairments that meet the requirements of final listings 14.09B and especially 14.09D. Final listing 14.09D recognizes that individuals with Lyme disease and other disorders that can cause inflammatory arthritis can have serious functional limitations as a result of their symptoms, including the kinds of symptoms described by the commenters. The functional criteria in final listing 14.09D and throughout the final immune system disorders listings recognize the ''invisible'' nature of most immune system disorders. As we noted in the preamble to the NPRM, they also consider the variable nature of the symptoms of immune system disorders. (See 71 FR at 44441)

As in the proposed rule, final 14.00J also provides that individuals with immune system disorders that do not meet the criteria of one of these listings can have impairments resulting from their immune system disorders that meet the requirements of listings in other body systems, such as neurological or mental disorders. In final 14.00D6e(iii), as in the NPRM, we list such extra-articular features of immune disorders that can cause inflammatory arthritis by body system to provide guidance about such other effects that these disorders, including Lyme disease, may have. However, in reviewing these comment letters and the proposed rules, we realized that we had inadvertently omitted reference to possible mental signs and symptoms in this section. Therefore, we are including the phrase ''mental (cognitive dysfunction, poor memory)'' in final 14.00D6e(iii) in response to these comments. The phrase is the same one that we use in final 14.00D7a(ii) for Sjögren's syndrome. We also added the same language in final 114.00D6e(iii) in part B.

Individuals who have Lyme disease but who do not have repeated manifestations of inflammatory arthritis can also qualify under the listings for SLE, Sjögren's syndrome, or other appropriate listings in the immune disorders body system or any other appropriate body system based on our policy of medical equivalence.

Finally, we carefully considered the recommendations of the commenter

who suggested ways to improve our evaluations of cases involving Lyme disease. These suggestions were covered by other general regulations and policy statements we have, such as our policies for evaluating symptoms and treating source opinions. Therefore, we decided not to adopt those comments.

Comment: Several commenters suggested that we add additional disorders to the listings, including myasthenia gravis, multiple sclerosis, colon cancer, chronic fatigue syndrome, and fibromyalgia.

Response: We have not added the specific disorders suggested by the commenters. In some instances the disorders are already included in our rules:

- Multiple sclerosis, listing 11.09 (neurological body system),
- Myasthenia gravis, listing 11.12 (neurological body system), and
- Stage IV colon cancer, listing 13.18 (malignant neoplastic diseases body system).

You can see all of our listings at: *http://www.socialsecurity.gov/OP_Home/cfr20/404/404-ap10.htm* and *http://www.socialsecurity.gov/disability/professionals/bluebook/index.htm*.

In other instances, such as fibromyalgia and chronic fatigue syndrome, we did not add the suggested disorders. Although we recognize fibromyalgia and chronic fatigue syndrome as medically determinable impairments, we do not list them, in part because there is not sufficient agreement in the medical community about the nature of these impairments. However, we may find that fibromyalgia and chronic fatigue syndrome medically equal a listing or that they are disabling at a later step of the sequential evaluation process for adults or children. See, for example, Social Security Ruling (SSR) 99–2p, *Titles II and XVI: Evaluating Cases Involving Chronic Fatigue Syndrome (CFS),* 64 FR 23380 (1999), available at *http://www.socialsecurity.gov/OP_Home/rulings/di/01/SSR99-02-di-01.html*.

Comment: Several commenters who have multiple immune disorders or family members with immune disorders noted that having multiple immune system disorders can significantly limit an individual's ability to function and to work. One commenter suggested that we include other autoimmune diseases that affect only one organ, such as Hashimoto's or Graves disease, as an additional disease entity to support one of the other listed immune system disorders in a disability claim.

Response: We agree that an individual with multiple immune system disorders may have significant limitations in the ability to function. However, we did not adopt this comment because we believe that the new functional criteria in each of the final listings will help individuals like the commenters and their family members without additional changes to the listings.

Other Comments

Comment: One commenter addressed our proposal to change the requirement throughout the listings in this body system that an individual have all four of the constitutional symptoms and signs to a requirement for only two of the constitutional symptoms and signs. The commenter noted that fatigue and malaise are both symptoms, and therefore, that an individual could meet this requirement of several of the immune system disorders listings with two symptoms. The commenter also indicated that these symptoms are ''exceedingly common'' in the general population and said that they are poor discriminators of severity. Therefore, the commenter suggested that we consider fatigue and malaise as one criterion, that is, fatigue/malaise, rather than two separate criteria.

Response: We did not adopt this comment. As we define them in final 14.00C2 and 114.00C2, the symptoms of fatigue and malaise are quite severe and not at all common in the general population. As we indicated in the preamble to the NPRM, we proposed to add these definitions ''in response to the many comments we received [on the ANPRM and in the outreach meetings] that indicated that the fatigue and malaise that people who have immune system disorders experience can be very limiting.'' (71 FR at 44435) In discussing the proposed functional criteria, we also reported that ''[a] number of people indicated that the fatigue associated with these disorders was not merely a feeling of tiredness but a more profound and debilitating experience.'' (71 FR at 44440) This is consistent with information we received from medical specialists in immune system disorders at the outreach meetings and our own review of the medical literature. (See 71 FR at 44448 for a list of the medical references we consulted when we were preparing the proposed rules.) Moreover, the presence of two of the constitutional symptoms and signs is only one criterion in the listings. To meet any of the listings that include this criterion, the individual must also have an established immune system disorder and involvement of at least two organs or body systems. As we explained in the preamble to the NPRM, we proposed to revise the requirement for all four constitutional symptoms and signs to ''at least two'' of the constitutional symptoms or signs:

> because we believe that the requirement in the current listing is too severe. We believe that any individual with an autoimmune disorder involving two or more organs/body systems with one organ/body system involved to at least a moderate level of severity and who has at least two of the constitutional symptoms and signs in these listings will have an impairment that precludes any gainful activity.

(71 FR at 44442)

Comment: One commenter noted that multiple listings (for example, proposed listings 14.02B, 14.03B, and 14.06B) used the phrase ''without the requisite findings in A.'' The commenter thought that the phrase was unclear, and that it was not clear when this listing criterion would apply. For example, the commenter asked whether this meant in proposed listing 14.02B that the individual had involvement of only one organ or that there was involvement of two organs but neither to a ''moderate'' degree.

Response: We adopted the comment by deleting the phrase ''but without the requisite findings in'' from the proposed listings that included that phrase, except in listings 14.08K and 114.08L. Because of their structure, some proposed listings referred only to paragraph A, while others referred to additional paragraphs. For example, proposed listing 14.04D included the phrase ''but without the requisite findings in A, B, or C.'' We removed all of these references. We also made conforming editorial changes to the first sentence in final 14.00I1 and 114.00I1.

In considering the comment, we realized that the phrase was unnecessary and that deleting it would not change our intent. For example, an individual's SLE meets final listing 14.02A if there is involvement of at least two organs/body systems with one of the organs/body systems involved to at least a moderate level of severity and with at least two of the constitutional symptoms and signs. An individual's SLE meets listing 14.02B if it causes repeated manifestations of SLE, at least two of the constitutional symptoms and signs, and a ''marked'' limitation in one of the listed areas of functioning. There is no need for a reference to listing 14.02A in listing 14.02B.

The same can be said about final listings 14.08K and 114.08L. However, we decided to keep the phrase in those listings because it has been in the prior versions of those listings for many years, is clear in the context of those listings, and is followed by parenthetical

examples that we do not want to remove.

We also realized that related language we proposed in the listings was unclear in other ways. The phrase ''Repeated manifestations of [the listed immune disorder] * * * resulting in at least two of the constitutional symptoms or signs'' could have been misinterpreted. It could have been read to mean that we would need evidence demonstrating that the constitutional symptoms or signs were the result of the *manifestations* of the immune system disorder, not the immune system disorder itself. We revised the language to clarify our intent, which is that the constitutional symptoms and signs can be the result of either the immune disorder itself or any of its manifestations. Also, some of the listings, for example, proposed listing 14.02A2 (which was referenced by proposed listing 14.02B), used the unclear phrase ''At least two of *the following* constitutional symptoms or signs: Severe fatigue, fever, malaise, or involuntary weight loss.'' (Emphasis added.) This could have been misinterpreted to mean that there are other constitutional symptoms and signs. Therefore, we revised all of the listings that included this statement to say ''At least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss).'' For consistency with this change, we also revised our definition of ''constitutional symptoms or signs'' in proposed 14.00C and 114.00C to explain that the fatigue must be ''severe fatigue'' for purposes of these listings. This is not a substantive change in the proposed rules because in fact all of the proposed listings required ''severe fatigue'' when they referred to constitutional symptoms or signs.

Comment: One commenter suggested that we specify in these rules which tests we will not purchase, such as angiography and tissue biopsy. The commenter noted that this would also make the immune system disorders listings consistent with the most recent revision of the cardiovascular system listings, which we issued in early 2006.

Response: We adopted the comment. The new guidance is in final 14.00D2b, 14.00D4b, and 14.00F1 and the corresponding childhood sections. We considered adding the same language in final 14.00F3 and 114.00F3 but decided not to because there are some manifestations for which we may purchase tests, such as routine types of blood tests.

Comment: One commenter noted that the heading in proposed 14.00D was different than the headings in proposed 14.00E and 14.00F. The commenter suggested revisions to the headings of 14.00D, 14.00E, and 14.00F that would make them consistent with each other.

Response: We adopted the comment. The commenter recommended that we change the headings to declarative statements, but we retained the question form to be consistent with most of the other headings in this body system. Otherwise, we used the same language the commenter recommended.

Comment: One commenter suggested that we use simple terms in these rules.

Response: We have simplified the language as much as we can given the complexity of these disorders. However, to provide useful adjudicative guidance, our rules need to reference the technical terms that are used in medical records and severity terms we use in our regulations. When appropriate, we have provided definitions of these terms in final 14.00C and 114.00C and elsewhere in these final rules.

Comment: One commenter questioned how we can give benefits to some and deny others when an autoimmune disease is a disabling disease with no hope of getting better.

Response: While we understand the concern of the commenter, we also recognize that many individuals who are diagnosed with autoimmune disorders lead reasonably normal lives, including regular employment. We can pay benefits only to individuals who are under a disability as defined in the Act and in our regulations. The issue in a disability determination under the listings is whether the individual has an impairment that prevents him or her from engaging in any gainful activity (or in a child, that causes ''marked and severe functional limitations''), and that can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. If the impairment does not meet or medically equal the listings, we may still find that the impairment is disabling based on an assessment of the individual's residual functional capacity (or the child's ability to function).

Comment: One commenter suggested that it will be essential to provide a training program for all workers who are involved in the disability process, particularly those who make the initial determination. The commenter indicated that it will be necessary for adjudicators to understand all of the information in the introductory text and that this will be difficult for them. The commenter also remarked that we should be aware that it will be more burdensome and time-consuming for treating physicians to understand the nuances of these rules and that physicians have less and less time to deal with extensive reading in order to complete a form or to write letters for their patients' disability claims.

Response: We agree that training on these final rules will be needed. We will conduct training that will provide adjudicators with guidance on applying these listings.

We do not believe the expanded guidance in these final rules imposes additional burdens on treating physicians. It is our responsibility to decide whether individuals meet the criteria of these rules, and the information we need from treating sources so that we can make our decision is no different under these rules than it was before. As we have already explained, we expect that in some cases we will need even less information than we did in the past because of additional medical and functional criteria in these listings that will permit us to allow individuals who should be allowed under the listings instead of at a later step in the sequential evaluation process.

Even the new functional criteria in the listings will not impose a new burden on treating sources. This is because when we ask for information from treating and other medical sources we also ask them for opinions about how their patients' medical conditions limit functioning in case we need to consider residual functional capacity or, for children, functional equivalence. See, for example, §§ 404.1513 and 416.913 of our regulations. We will be able to use the same information treating sources provide for residual functional capacity assessments or determinations about functional equivalence to make our determinations about limitations under the new listings and, in some cases, will need even less information when the functional limitations are clearly as serious as the listings describe.

What is our authority to make rules and set procedures for determining whether a person is disabled under the statutory definition?

Section 205(a) of the Act and, by reference to section 205(a), section 1631(d)(1) provide that:

> The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these final rules meet the requirements for a significant regulatory action under Executive Order 12866, as amended. Thus, they were subject to OMB review.

Regulatory Flexibility Act

We certify that these final rules do not have a significant economic impact on a substantial number of small entities because they affect only individuals. Thus, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 says that no persons are required to respond to a collection of information unless it displays a valid OMB control number. In accordance with the PRA, SSA is providing notice that OMB has approved the information collection requirements contained in sections 14.00B, 14.00D, 14.00E, 14.00F, 114.00B, 114.00D, 114.00E, 114.00F, 114.08 and 114.09 of these final rules. The OMB Control Number for this collection is 0960–0642, expiring March 31, 2008.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security-Retirement Insurance; 96.004, Social Security-Survivors Insurance; and 96.006, Supplemental Security Income)

List of Subjects in 20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors, and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

Michael J. Astrue,

Commissioner of Social Security.

■ For the reasons set out in the preamble, we are amending subpart P of part 404 of chapter III of title 20 of the Code of Federal Regulations as set forth below:

PART 404—FEDERAL OLD–AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

■ 1. The authority citation for subpart P of part 404 continues to read as follows:

Authority: Secs. 202, 205(a), (b), and (d)–(h), 216(i), 221(a) and (i), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a), (b), and (d)–(h), 416(i), 421(a) and (i), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189; sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

Appendix 1 to Subpart P of Part 404—[Amended]

■ 2. Appendix 1 to subpart P of Part 404 is amended as follows:

■ a. Revise the body system name and the expiration date in item 15 of the introductory text before part A of appendix 1.

■ b. Amend the table of contents for part A of appendix 1 by revising the body system name for section 14.00.

■ c. Revise the second sentence of section 1.00B1 of part A of appendix 1.

■ d. Revise the fourth sentence of section 1.00L of part A of appendix 1.

■ e. Revise section 8.00D3 of part A of appendix 1.

■ f. Revise the second sentence of section 13.00A of part A of appendix 1.

■ g. Revise section 14.00 of part A of appendix 1.

■ h. Amend the table of contents for part B of appendix 1 by revising the body system name for section 14.00.

■ i. Revise the second sentence of section 101.00B1 of part B of appendix 1.

■ j. Revise the fourth sentence of section 101.00L of part B of appendix 1.

■ k. Revise section 108.00D3 of part B of appendix 1.

■ l. Revise the second sentence of section 113.00A of part B of appendix 1.

■ m. Revise section 114.00 of part B of appendix 1.

The revised text is set forth as follows:

Appendix 1 to Subpart P of Part 404—Listing of Impairments

* * * * *

15. Immune System Disorders (14.00 and 114.00): June 16, 2016.

Part A

* * * * *

14.00 Immune System Disorders.

1.00 MUSCULOSKELETAL SYSTEM

* * * * *

B. * * *

1 * * * The provisions of 1.02 and 1.03 notwithstanding, inflammatory arthritis is evaluated under 14.09 (see 14.00D6). * * *

* * * * *

L. * * * When the abnormal curvature of the spine results in symptoms related to fixation of the dorsolumbar or cervical spine, evaluation of equivalence may be made by reference to 14.09C. * * *

* * * * *

8.00 SKIN DISORDERS

* * * * *

D. * * *

3. *Autoimmune disorders and other immune system disorders* (for example, systemic lupus erythematosus (SLE), scleroderma, human immunodeficiency virus (HIV) infection, and Sjögren's syndrome) often involve more than one body system. We first evaluate these disorders under the immune system disorders listings in 14.00. We evaluate SLE under 14.02, scleroderma under 14.04, HIV infection under 14.08, and Sjögren's syndrome under 14.10.

* * * * *

13.00 MALIGNANT NEOPLASTIC DISEASES

A. * * * We use the criteria in 14.08E to evaluate carcinoma of the cervix, Kaposi's sarcoma, lymphoma, and squamous cell carcinoma of the anal canal and anal margin if you also have HIV infection.

* * * * *

14.00 IMMUNE SYSTEM DISORDERS

A. *What disorders do we evaluate under the immune system disorders listings?*

1. *We evaluate immune system disorders that cause dysfunction in one or more components of your immune system.*

a. The dysfunction may be due to problems in antibody production, impaired cell-mediated immunity, a combined type of antibody/cellular deficiency, impaired phagocytosis, or complement deficiency.

b. Immune system disorders may result in recurrent and unusual infections, or inflammation and dysfunction of the body's own tissues. Immune system disorders can cause a deficit in a single organ or body system that results in extreme (that is, very serious) loss of function. They can also cause lesser degrees of limitations in two or more organs or body systems, and when associated with symptoms or signs, such as severe fatigue, fever, malaise, diffuse musculoskeletal pain, or involuntary weight loss, can also result in extreme limitation.

c. We organize the discussions of immune system disorders in three categories: Autoimmune disorders; Immune deficiency disorders, excluding human immunodeficiency virus (HIV) infection; and HIV infection.

2. *Autoimmune disorders (14.00D).* Autoimmune disorders are caused by dysfunctional immune responses directed against the body's own tissues, resulting in chronic, multisystem impairments that differ in clinical manifestations, course, and outcome. They are sometimes referred to as rheumatic diseases, connective tissue disorders, or collagen vascular disorders. Some of the features of autoimmune disorders in adults differ from the features of the same disorders in children.

3. *Immune deficiency disorders, excluding HIV infection (14.00E).* Immune deficiency disorders are characterized by recurrent or unusual infections that respond poorly to treatment, and are often associated with complications affecting other parts of the body. Immune deficiency disorders are classified as either *primary* (congenital) or *acquired.* Individuals with immune deficiency disorders also have an increased risk of malignancies and of having autoimmune disorders.

4. *Human immunodeficiency virus (HIV) infection (14.00F).* HIV infection may be characterized by increased susceptibility to opportunistic infections, cancers, or other conditions, as described in 14.08.

B. *What information do we need to show that you have an immune system disorder?*

Generally, we need your medical history, a report(s) of a physical examination, a report(s) of laboratory findings, and in some instances, appropriate medically acceptable imaging or tissue biopsy reports to show that you have an immune system disorder. Therefore, we will make every reasonable effort to obtain your medical history, medical findings, and results of laboratory tests. We explain the information we need in more detail in the sections below.

C. Definitions

1. *Appropriate medically acceptable imaging* includes, but is not limited to, angiography, x-ray imaging, computerized axial tomography (CAT scan) or magnetic resonance imaging (MRI), with or without contrast material, myelography, and radionuclear bone scans. ''Appropriate'' means that the technique used is the proper one to support the evaluation and diagnosis of the impairment.

2. *Constitutional symptoms or signs*, as used in these listings, means severe fatigue, fever, malaise, or involuntary weight loss. *Severe fatigue* means a frequent sense of exhaustion that results in significantly reduced physical activity or mental function. *Malaise* means frequent feelings of illness, bodily discomfort, or lack of well-being that result in significantly reduced physical activity or mental function.

3. *Disseminated* means that a condition is spread over a considerable area. The type and extent of the spread will depend on your specific disease.

4. *Dysfunction* means that one or more of the body regulatory mechanisms are impaired, causing either an excess or deficiency of immunocompetent cells or their products.

5. *Extra-articular* means ''other than the joints''; for example, an organ(s) such as the heart, lungs, kidneys, or skin.

6. *Inability to ambulate effectively* has the same meaning as in 1.00B2b.

7. *Inability to perform fine and gross movements effectively* has the same meaning as in 1.00B2c.

8. *Major peripheral joints* has the same meaning as in 1.00F.

9. *Persistent* means that a sign(s) or symptom(s) has continued over time. The precise meaning will depend on the specific immune system disorder, the usual course of the disorder, and the other circumstances of your clinical course.

10. *Recurrent* means that a condition that previously responded adequately to an appropriate course of treatment returns after a period of remission or regression. The precise meaning, such as the extent of response or remission and the time periods involved, will depend on the specific disease or condition you have, the body system affected, the usual course of the disorder and its treatment, and the other facts of your particular case.

11. *Resistant to treatment* means that a condition did not respond adequately to an appropriate course of treatment. Whether a response is adequate or a course of treatment is appropriate will depend on the specific disease or condition you have, the body system affected, the usual course of the disorder and its treatment, and the other facts of your particular case.

12. *Severe* means medical severity as used by the medical community. The term does not have the same meaning as it does when we use it in connection with a finding at the second step of the sequential evaluation processes in §§ 404.1520, 416.920, and 416.924.

D. How do we document and evaluate the listed autoimmune disorders?

1. *Systemic lupus erythematosus (14.02).*

a. *General.* Systemic lupus erythematosus (SLE) is a chronic inflammatory disease that can affect any organ or body system. It is frequently, but not always, accompanied by constitutional symptoms or signs (severe fatigue, fever, malaise, involuntary weight loss). Major organ or body system involvement can include: Respiratory (pleuritis, pneumonitis), cardiovascular (endocarditis, myocarditis, pericarditis, vasculitis), renal (glomerulonephritis), hematologic (anemia, leukopenia, thrombocytopenia), skin (photosensitivity), neurologic (seizures), mental (anxiety, fluctuating cognition (''lupus fog''), mood disorders, organic brain syndrome, psychosis), or immune system disorders (inflammatory arthritis). Immunologically, there is an array of circulating serum auto-antibodies and pro- and anti-coagulant proteins that may occur in a highly variable pattern.

b. *Documentation of SLE.* Generally, but not always, the medical evidence will show that your SLE satisfies the criteria in the current ''Criteria for the Classification of Systemic Lupus Erythematosus'' by the American College of Rheumatology found in the most recent edition of the *Primer on the Rheumatic Diseases* published by the Arthritis Foundation.

2. *Systemic vasculitis (14.03).*

a. *General.*

(i) Vasculitis is an inflammation of blood vessels. It may occur acutely in association with adverse drug reactions, certain chronic infections, and occasionally, malignancies. More often, it is chronic and the cause is unknown. Symptoms vary depending on which blood vessels are involved. Systemic vasculitis may also be associated with other autoimmune disorders; for example, SLE or dermatomyositis.

(ii) There are several clinical patterns, including but not limited to polyarteritis nodosa, Takayasu's arteritis (aortic arch arteritis), giant cell arteritis (temporal arteritis), and Wegener's granulomatosis.

b. *Documentation of systemic vasculitis.* Angiography or tissue biopsy confirms a diagnosis of systemic vasculitis when the disease is suspected clinically. When you have had angiography or tissue biopsy for systemic vasculitis, we will make every reasonable effort to obtain reports of the results of that procedure. However, we will not purchase angiography or tissue biopsy.

3. *Systemic sclerosis (scleroderma) (14.04).*

a. *General.* Systemic sclerosis (scleroderma) constitutes a spectrum of disease in which thickening of the skin is the clinical hallmark. Raynaud's phenomenon, often medically severe and progressive, is present frequently and may be the peripheral manifestation of a vasospastic abnormality in the heart, lungs, and kidneys. The CREST syndrome (calcinosis, Raynaud's phenomenon, esophageal dysmotility, sclerodactyly, and telangiectasia) is a variant that may slowly progress over years to the generalized process, systemic sclerosis.

b. *Diffuse cutaneous systemic sclerosis.* In diffuse cutaneous systemic sclerosis (also known as diffuse scleroderma), major organ or systemic involvement can include the gastrointestinal tract, lungs, heart, kidneys, and muscle in addition to skin or blood vessels. Although arthritis can occur, joint dysfunction results primarily from soft tissue/cutaneous thickening, fibrosis, and contractures.

c. *Localized scleroderma (linear scleroderma and morphea).*

(i) Localized scleroderma (linear scleroderma and morphea) is more common in children than in adults. However, this type of scleroderma can persist into adulthood. To assess the severity of the impairment, we need a description of the extent of involvement of linear scleroderma and the location of the lesions. For example, linear scleroderma involving the arm but not crossing any joints is not as functionally limiting as sclerodactyly (scleroderma localized to the fingers). Linear scleroderma of a lower extremity involving skin thickening and atrophy of underlying muscle or bone can result in contractures and leg length discrepancy. In such cases, we may evaluate your impairment under the musculoskeletal listings (1.00).

(ii) When there is isolated morphea of the face causing facial disfigurement from unilateral hypoplasia of the mandible, maxilla, zygoma, or orbit, adjudication may be more appropriate under the criteria in the affected body system, such as special senses and speech (2.00) or mental disorders (12.00).

(iii) Chronic variants of these syndromes include disseminated morphea, Shulman's disease (diffuse fasciitis with eosinophilia), and eosinophilia-myalgia syndrome (often associated with toxins such as toxic oil or contaminated tryptophan), all of which can impose medically severe musculoskeletal dysfunction and may also lead to restrictive pulmonary disease. We evaluate these variants of the disease under the criteria in the musculoskeletal listings (1.00) or respiratory system listings (3.00).

d. *Documentation of systemic sclerosis (scleroderma).* Documentation involves differentiating the clinical features of systemic sclerosis (scleroderma) from other autoimmune disorders. However, there may be an overlap.

4. *Polymyositis and dermatomyositis (14.05).*

a. *General.* Polymyositis and dermatomyositis are related disorders that are characterized by an inflammatory process in striated muscle, occurring alone or in association with other autoimmune disorders or malignancy. The most common manifestations are symmetric weakness, and less frequently, pain and tenderness of the proximal limb-girdle (shoulder or pelvic) musculature. There may also be involvement of the cervical, cricopharyngeal, esophageal, intercostal, and diaphragmatic muscles.

b. *Documentation of polymyositis and dermatomyositis.* Generally, but not always, polymyositis is associated with elevated serum muscle enzymes (creatine phosphokinase (CPK), aminotransferases, and aldolase), and characteristic abnormalities on electromyography and muscle biopsy. In dermatomyositis there are characteristic skin findings in addition to the findings of polymyositis. When you have had electromyography or muscle biopsy for polymyositis or dermatomyositis, we will make every reasonable effort to obtain reports of the results of that procedure. However, we will not purchase electromyography or muscle biopsy.

c. *Additional information about how we evaluate polymyositis and dermatomyositis under the listings.*

(i) Weakness of your pelvic girdle muscles that results in your inability to rise independently from a squatting or sitting position or to climb stairs may be an indication that you are unable to ambulate effectively. Weakness of your shoulder girdle muscles may result in your inability to perform lifting, carrying, and reaching overhead, and also may seriously affect your ability to perform activities requiring fine movements. We evaluate these limitations under 14.05A.

(ii) We use the malignant neoplastic diseases listings (13.00) to evaluate malignancies associated with polymyositis or dermatomyositis. We evaluate the involvement of other organs/body systems under the criteria for the listings in the affected body system.

5. *Undifferentiated and mixed connective tissue disease (14.06).*

a. *General.* This listing includes syndromes with clinical and immunologic features of several autoimmune disorders, but which do not satisfy the criteria for any of the specific disorders described. For example, you may have clinical features of SLE and systemic vasculitis, and the serologic (blood test) findings of rheumatoid arthritis.

b. *Documentation of undifferentiated and mixed connective tissue disease.* Undifferentiated connective tissue disease is diagnosed when clinical features and serologic (blood test) findings, such as rheumatoid factor or antinuclear antibody (consistent with an autoimmune disorder) are present but do not satisfy the criteria for a specific disease. Mixed connective tissue disease (MCTD) is diagnosed when clinical features and serologic findings of two or more autoimmune diseases overlap.

6. *Inflammatory arthritis (14.09).*

a. *General.* The spectrum of inflammatory arthritis includes a vast array of disorders that differ in cause, course, and outcome. Clinically, inflammation of major peripheral joints may be the dominant manifestation causing difficulties with ambulation or fine and gross movements; there may be joint pain, swelling, and tenderness. The arthritis may affect other joints, or cause less limitation in ambulation or the performance of fine and gross movements. However, in combination with extra-articular features, including constitutional symptoms or signs (severe fatigue, fever, malaise, involuntary weight loss), inflammatory arthritis may result in an extreme limitation.

b. *Inflammatory arthritis involving the axial spine (spondyloarthropathy).* In adults, inflammatory arthritis involving the axial spine may be associated with disorders such as:

(i) Reiter's syndrome;
(ii) Ankylosing spondylitis;
(iii) Psoriatic arthritis;
(iv) Whipple's disease;
(v) Behçet's disease; and
(vi) Inflammatory bowel disease.

c. *Inflammatory arthritis involving the peripheral joints.* In adults, inflammatory arthritis involving peripheral joints may be associated with disorders such as:

(i) Rheumatoid arthritis;
(ii) Sjögren's syndrome;
(iii) Psoriatic arthritis;
(iv) Crystal deposition disorders (gout and pseudogout);
(v) Lyme disease; and
(vi) Inflammatory bowel disease.

d. *Documentation of inflammatory arthritis.* Generally, but not always, the diagnosis of inflammatory arthritis is based on the clinical features and serologic findings described in the most recent edition of the Primer on the Rheumatic Diseases published by the Arthritis Foundation.

e. *How we evaluate inflammatory arthritis under the listings.*

(i) Listing-level severity in 14.09A and 14.09C1 is shown by an impairment that results in an ''extreme'' (very serious) limitation. In 14.09A, the criterion is satisfied with persistent inflammation or deformity in one major peripheral weight-bearing joint resulting in the inability to ambulate effectively (as defined in 14.00C6) or one major peripheral joint in each upper extremity resulting in the inability to perform fine and gross movements effectively (as defined in 14.00C7). In 14.09C1, if you have the required ankylosis (fixation) of your cervical or dorsolumbar spine, we will find that you have an extreme limitation in your ability to see in front of you, above you, and to the side. Therefore, inability to ambulate effectively is implicit in 14.09C1, even though you might not require bilateral upper limb assistance.

(ii) Listing-level severity is shown in 14.09B, 14.09C2, and 14.09D by inflammatory arthritis that involves various combinations of complications of one or more major peripheral joints or other joints, such as inflammation or deformity, extra-articular features, repeated manifestations, and constitutional symptoms or signs. Extra-articular impairments may also meet listings in other body systems.

(iii) Extra-articular features of inflammatory arthritis may involve any body system; for example: Musculoskeletal (heel enthesopathy), ophthalmologic (iridocyclitis, keratoconjunctivitis sicca, uveitis), pulmonary (pleuritis, pulmonary fibrosis or nodules, restrictive lung disease), cardiovascular (aortic valve insufficiency, arrhythmias, coronary arteritis, myocarditis, pericarditis, Raynaud's phenomenon, systemic vasculitis), renal (amyloidosis of the kidney), hematologic (chronic anemia, thrombocytopenia), neurologic (peripheral neuropathy, radiculopathy, spinal cord or cauda equina compression with sensory and motor loss), mental (cognitive dysfunction, poor memory), and immune system (Felty's syndrome (hypersplenism with compromised immune competence)).

(iv) If both inflammation and chronic deformities are present, we evaluate your impairment under the criteria of any appropriate listing.

7. *Sjögren's syndrome (14.10).*

a. *General.*

(i) Sjögren's syndrome is an immune-mediated disorder of the exocrine glands. Involvement of the lacrimal and salivary glands is the hallmark feature, resulting in symptoms of dry eyes and dry mouth, and possible complications, such as corneal damage, blepharitis (eyelid inflammation), dysphagia (difficulty in swallowing), dental caries, and the inability to speak for extended periods of time. Involvement of the exocrine glands of the upper airways may result in persistent dry cough.

(ii) Many other organ systems may be involved, including musculoskeletal (arthritis, myositis), respiratory (interstitial fibrosis), gastrointestinal (dysmotility, dysphagia, involuntary weight loss), genitourinary (interstitial cystitis, renal tubular acidosis), skin (purpura, vasculitis), neurologic (central nervous system disorders, cranial and peripheral neuropathies), mental (cognitive dysfunction, poor memory), and neoplastic (lymphoma). Severe fatigue and malaise are frequently reported. Sjögren's syndrome may be associated with other autoimmune disorders (for example, rheumatoid arthritis or SLE); usually the clinical features of the associated disorder predominate.

b. *Documentation of Sjögren's syndrome.* If you have Sjögren's syndrome, the medical evidence will generally, but not always, show that your disease satisfies the criteria in the current ''Criteria for the Classification of Sjögren's Syndrome'' by the American College of Rheumatology found in the most recent edition of the *Primer on the Rheumatic Diseases* published by the Arthritis Foundation.

E. How do we document and evaluate immune deficiency disorders, excluding HIV infection?

1. *General.*

a. Immune deficiency disorders can be classified as:

(i) *Primary* (congenital); for example, X-linked agammaglobulinemia, thymic hypoplasia (DiGeorge syndrome), severe combined immunodeficiency (SCID), chronic granulomatous disease (CGD), C1 esterase inhibitor deficiency.

(ii) *Acquired;* for example, medication-related.

b. Primary immune deficiency disorders are seen mainly in children. However, recent advances in the treatment of these disorders have allowed many affected children to survive well into adulthood. Occasionally, these disorders are first diagnosed in adolescence or adulthood.

2. *Documentation of immune deficiency disorders.* The medical evidence must include documentation of the specific type of immune deficiency. Documentation may be by laboratory evidence or by other generally

acceptable methods consistent with the prevailing state of medical knowledge and clinical practice.

3. *Immune deficiency disorders treated by stem cell transplantation.*

a. *Evaluation in the first 12 months.* If you undergo stem cell transplantation for your immune deficiency disorder, we will consider you disabled until at least 12 months from the date of the transplant.

b. *Evaluation after the 12-month period has elapsed.* After the 12-month period has elapsed, we will consider any residuals of your immune deficiency disorder as well as any residual impairment(s) resulting from the treatment, such as complications arising from:

(i) Graft-versus-host (GVH) disease.

(ii) Immunosuppressant therapy, such as frequent infections.

(iii) Significant deterioration of other organ systems.

4. *Medication-induced immune suppression.* Medication effects can result in varying degrees of immune suppression, but most resolve when the medication is ceased. However, if you are prescribed medication for long-term immune suppression, such as after an organ transplant, we will evaluate:

a. The frequency and severity of infections.

b. Residuals from the organ transplant itself, after the 12-month period has elapsed.

c. Significant deterioration of other organ systems.

F. How do we document and evaluate human immunodeficiency virus (HIV) infection?

Any individual with HIV infection, including one with a diagnosis of acquired immune deficiency syndrome (AIDS), may be found disabled under 14.08 if his or her impairment meets the criteria in that listing or is medically equivalent to the criteria in that listing.

1. *Documentation of HIV infection.* The medical evidence must include documentation of HIV infection. Documentation may be by laboratory evidence or by other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice. When you have had laboratory testing for HIV infection, we will make every reasonable effort to obtain reports of the results of that testing. However, we will not purchase laboratory testing to establish whether you have HIV infection.

a. *Definitive documentation of HIV infection.* A definitive diagnosis of HIV infection is documented by one or more of the following laboratory tests:

(i) HIV antibody tests. HIV antibodies are usually first detected by an ELISA screening test performed on serum. Because the ELISA can yield false positive results, confirmation is required using a more definitive test, such as a Western blot or an immunofluorescence assay.

(ii) Positive ''viral load'' (VL) tests. These tests are normally used to quantitate the amount of the virus present but also document HIV infection. Such tests include the quantitative plasma HIV RNA, quantitative plasma HIV branched DNA, and reverse transcriptase-polymerase chain reaction (RT-PCR).

(iii) HIV DNA detection by polymerase chain reaction (PCR).

(iv) A specimen that contains HIV antigen (for example, serum specimen, lymphocyte culture, or cerebrospinal fluid).

(v) A positive viral culture for HIV from peripheral blood mononuclear cells (PBMC).

(vi) Other tests that are highly specific for detection of HIV and that are consistent with the prevailing state of medical knowledge.

b. *Other acceptable documentation of HIV infection.* We may also document HIV infection without the definitive laboratory evidence described in 14.00F1a, provided that such documentation is consistent with the prevailing state of medical knowledge and clinical practice and is consistent with the other evidence in your case record. If no definitive laboratory evidence is available, we may document HIV infection by the medical history, clinical and laboratory findings, and diagnosis(es) indicated in the medical evidence. For example, we will accept a diagnosis of HIV infection without definitive laboratory evidence of the HIV infection if you have an opportunistic disease that is predictive of a defect in cell-mediated immunity (for example, toxoplasmosis of the brain, *Pneumocystis* pneumonia (PCP)), and there is no other known cause of diminished resistance to that disease (for example, long-term steroid treatment, lymphoma). In such cases, we will make every reasonable effort to obtain full details of the history, medical findings, and results of testing.

2. *CD4 tests.* Individuals who have HIV infection or other disorders of the immune system may have tests showing a reduction of either the absolute count or the percentage of their T-helper lymphocytes (CD4 cells). The extent of immune suppression correlates with the level or rate of decline of the CD4 count. Generally, when the CD4 count is below 200/mm^3 (or below 14 percent of the total lymphocyte count) the susceptibility to opportunistic infection is greatly increased. Although a reduced CD4 count alone does not establish a definitive diagnosis of HIV infection, a CD4 count below 200 does offer supportive evidence when there are clinical findings, but not a definitive diagnosis of an opportunistic infection(s). However, a reduced CD4 count alone does not document the severity or functional consequences of HIV infection.

3. *Documentation of the manifestations of HIV infection.* The medical evidence must also include documentation of the manifestations of HIV infection. Documentation may be by laboratory evidence or other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice.

a. *Definitive documentation of the manifestations of HIV infection.* The definitive method of diagnosing opportunistic diseases or conditions that are manifestations of HIV infection is by culture, serologic test, or microscopic examination of biopsied tissue or other material (for example, bronchial washings). We will make every reasonable effort to obtain specific laboratory evidence of an opportunistic disease or other condition whenever this information is available. If a histologic or other test has been performed, the evidence should include a copy of the appropriate report. If we cannot obtain the report, the summary of hospitalization or a report from the treating source should include details of the findings and results of the diagnostic studies (including appropriate medically acceptable imaging studies) or microscopic examination of the appropriate tissues or body fluids.

b. *Other acceptable documentation of the manifestations of HIV infection.* We may also document manifestations of HIV infection without the definitive laboratory evidence described in 14.00F3a, provided that such documentation is consistent with the prevailing state of medical knowledge and clinical practice and is consistent with the other evidence in your case record. For example, many conditions are now commonly diagnosed based on some or all of the following: Medical history, clinical manifestations, laboratory findings (including appropriate medically acceptable imaging), and treatment responses. In such cases, we will make every reasonable effort to obtain full details of the history, medical findings, and results of testing. The following are examples of how we may document manifestations of HIV infection with other appropriate evidence.

(i) Although a definitive diagnosis of PCP requires identifying the organism in bronchial washings, induced sputum, or lung biopsy, these tests are frequently bypassed if PCP can be diagnosed presumptively. Supportive evidence may include: Fever, dyspnea, hypoxia, CD4 count below 200, and no evidence of bacterial pneumonia. Also supportive are bilateral lung interstitial infiltrates on x-ray, a typical pattern on CAT scan, or a gallium scan positive for pulmonary uptake. Response to anti-PCP therapy usually requires 5–7 days, and such a response can be supportive of the diagnosis.

(ii) Documentation of *Cytomegalovirus* (CMV) disease (14.08D) may present special problems because definitive diagnosis (except for chorioretinitis, which may be diagnosed by an ophthalmologist or optometrist on funduscopic examination) requires identification of viral inclusion bodies or a positive culture from the affected organ and the absence of any other infectious agent likely to be causing the disease. A positive serology test does not establish a definitive diagnosis of CMV disease, but does offer supportive evidence of a presumptive diagnosis of CMV disease. Other clinical findings that support a presumptive diagnosis of CMV may include: Fever, urinary culture positive for CMV, and CD4 count below 200. A clear response to anti-CMV therapy also supports a diagnosis.

(iii) A definitive diagnosis of toxoplasmosis of the brain is based on brain biopsy, but this procedure carries significant risk and is not commonly performed. This condition is usually diagnosed presumptively based on symptoms or signs of fever, headache, focal neurologic deficits, seizures, typical lesions on brain imaging, and a positive serology test.

(iv) Candidiasis of the esophagus (also known as *Candida* esophagitis) may be presumptively diagnosed based on symptoms

of retrosternal pain on swallowing (odynophagia) and either oropharyngeal thrush (white patches or plaques) diagnosed on physical examination or by microscopic documentation of *Candida* fungal elements from a noncultured specimen scraped from the oral mucosa. Treatment with oral (systemic) antifungal agents usually produces improvement after 5 or more days of therapy, and such a response can be supportive of the diagnosis.

4. *HIV infection manifestations specific to women.*

a. *General.* Most women with severe immunosuppression secondary to HIV infection exhibit the typical opportunistic infections and other conditions, such as PCP, *Candida* esophagitis, wasting syndrome, cryptococcosis, and toxoplasmosis. However, HIV infection may have different manifestations in women than in men. Adjudicators must carefully scrutinize the medical evidence and be alert to the variety of medical conditions specific to, or common in, women with HIV infection that may affect their ability to function in the workplace.

b. *Additional considerations for evaluating HIV infection in women.* Many of these manifestations (for example, vulvovaginal candidiasis, pelvic inflammatory disease) occur in women with or without HIV infection, but can be more severe or resistant to treatment, or occur more frequently in a woman whose immune system is suppressed. Therefore, when evaluating the claim of a woman with HIV infection, it is important to consider gynecologic and other problems specific to women, including any associated symptoms (for example, pelvic pain), in assessing the severity of the impairment and resulting functional limitations. We may evaluate manifestations of HIV infection in women under the specific criteria (for example, cervical cancer under 14.08E), under an applicable general category (for example, pelvic inflammatory disease under 14.08A4) or, in appropriate cases, under 14.08K.

5. *Involuntary weight loss.* For purposes of 14.08H, an involuntary weight loss of at least 10 percent of baseline is always considered ''significant.'' Loss of less than 10 percent may or may not be significant, depending on the individual's baseline weight and body habitus. For example, a 7-pound weight loss in a 100-pound woman who is 63 inches tall might be considered significant; but a 14-pound weight loss in a 200-pound woman who is the same height might not be significant. HIV infection that affects the digestive system and results in malnutrition can also be evaluated under 5.08.

G. How do we consider the effects of treatment in evaluating your autoimmune disorder, immune deficiency disorder, or HIV infection?

1. *General.* If your impairment does not otherwise meet the requirements of a listing, we will consider your medical treatment in terms of its effectiveness in improving the signs, symptoms, and laboratory abnormalities of your specific immune system disorder or its manifestations, and in terms of any side effects that limit your functioning. We will make every reasonable effort to obtain a specific description of the treatment you receive (including surgery) for your immune system disorder. We consider:

a. The effects of medications you take.

b. Adverse side effects (acute and chronic).

c. The intrusiveness and complexity of your treatment (for example, the dosing schedule, need for injections).

d. The effect of treatment on your mental functioning (for example, cognitive changes, mood disturbance).

e. Variability of your response to treatment (see 14.00G2).

f. The interactive and cumulative effects of your treatments. For example, many individuals with immune system disorders receive treatment both for their immune system disorders and for the manifestations of the disorders or co-occurring impairments, such as treatment for HIV infection and hepatitis C. The interactive and cumulative effects of these treatments may be greater than the effects of each treatment considered separately.

g. The duration of your treatment.

h. Any other aspects of treatment that may interfere with your ability to function.

2. *Variability of your response to treatment.* Your response to treatment and the adverse or beneficial consequences of your treatment may vary widely. The effects of your treatment may be temporary or long term. For example, some individuals may show an initial positive response to a drug or combination of drugs followed by a decrease in effectiveness. When we evaluate your response to treatment and how your treatment may affect you, we consider such factors as disease activity before treatment, requirements for changes in therapeutic regimens, the time required for therapeutic effectiveness of a particular drug or drugs, the limited number of drug combinations that may be available for your impairment(s), and the time-limited efficacy of some drugs. For example, an individual with HIV infection or another immune deficiency disorder who develops pneumonia or tuberculosis may not respond to the same antibiotic regimen used in treating individuals without HIV infection or another immune deficiency disorder, or may not respond to an antibiotic that he or she responded to before. Therefore, we must consider the effects of your treatment on an individual basis, including the effects of your treatment on your ability to function.

3. *How we evaluate the effects of treatment for autoimmune disorders on your ability to function.* Some medications may have acute or long-term side effects. When we consider the effects of corticosteroids or other treatments for autoimmune disorders on your ability to function, we consider the factors in 14.00G1 and 14.00G2. Long-term corticosteroid treatment can cause ischemic necrosis of bone, posterior subcapsular cataract, weight gain, glucose intolerance, increased susceptibility to infection, and osteoporosis that may result in a loss of function. In addition, medications used in the treatment of autoimmune disorders may also have effects on mental functioning, including cognition (for example, memory), concentration, and mood.

4. *How we evaluate the effects of treatment for immune deficiency disorders, excluding HIV infection, on your ability to function.* When we consider the effects of your treatment for your immune deficiency disorder on your ability to function, we consider the factors in 14.00G1 and 14.00G2. A frequent need for treatment such as intravenous immunoglobulin and gamma interferon therapy can be intrusive and interfere with your ability to work. We will also consider whether you have chronic side effects from these or other medications, including severe fatigue, fever, headaches, high blood pressure, joint swelling, muscle aches, nausea, shortness of breath, or limitations in mental function including cognition (for example, memory), concentration, and mood.

5. *How we evaluate the effects of treatment for HIV infection on your ability to function.*

a. *General.* When we consider the effects of antiretroviral drugs (including the effects of highly active antiretroviral therapy (HAART)) and the effects of treatments for the manifestations of HIV infection on your ability to function, we consider the factors in 14.00G1 and 14.00G2. Side effects of antiretroviral drugs include, but are not limited to: Bone marrow suppression, pancreatitis, gastrointestinal intolerance (nausea, vomiting, diarrhea), neuropathy, rash, hepatotoxicity, lipodystrophy (fat redistribution, such as ''buffalo hump''), glucose intolerance, and lactic acidosis. In addition, medications used in the treatment of HIV infection may also have effects on mental functioning, including cognition (for example, memory), concentration, and mood, and may result in malaise, severe fatigue, joint and muscle pain, and insomnia. The symptoms of HIV infection and the side effects of medication may be indistinguishable from each other. We will consider all of your functional limitations, whether they result from your symptoms or signs of HIV infection or the side effects of your treatment.

b. *Structured treatment interruptions.* A structured treatment interruption (STI, also called a ''drug holiday'') is a treatment practice during which your treating source advises you to stop taking your medications temporarily. An STI in itself does not imply that your medical condition has improved; nor does it imply that you are noncompliant with your treatment because you are following your treating source's advice. Therefore, if you have stopped taking medication because your treating source prescribed or recommended an STI, we will not find that you are failing to follow treatment or draw inferences about the severity of your impairment on this fact alone. We will consider why your treating source has prescribed or recommended an STI and all the other information in your case record when we determine the severity of your impairment.

6. *When there is no record of ongoing treatment.* If you have not received ongoing treatment or have not had an ongoing relationship with the medical community despite the existence of a severe impairment(s), we will evaluate the medical severity and duration of your immune system disorder on the basis of the current objective medical evidence and other evidence in your

case record, taking into consideration your medical history, symptoms, clinical and laboratory findings, and medical source opinions. If you have just begun treatment and we cannot determine whether you are disabled based on the evidence we have, we may need to wait to determine the effect of the treatment on your ability to function. The amount of time we need to wait will depend on the facts of your case. If you have not received treatment, you may not be able to show an impairment that meets the criteria of one of the immune system disorders listings, but your immune system disorder may medically equal a listing or be disabling based on a consideration of your residual functional capacity, age, education, and work experience.

H. How do we consider your symptoms, including your pain, severe fatigue, and malaise?

Your symptoms, including pain, severe fatigue, and malaise, may be important factors in our determination whether your immune system disorder(s) meets or medically equals a listing or in our determination whether you are otherwise able to work. In order for us to consider your symptoms, you must have medical signs or laboratory findings showing the existence of a medically determinable impairment(s) that could reasonably be expected to produce the symptoms. If you have such an impairment(s), we will evaluate the intensity, persistence, and functional effects of your symptoms using the rules throughout 14.00 and in our other regulations. See §§ 404.1528, 404.1529, 416.928, and 416.929. Additionally, when we assess the credibility of your complaints about your symptoms and their functional effects, we will not draw any inferences from the fact that you do not receive treatment or that you are not following treatment without considering all of the relevant evidence in your case record, including any explanations you provide that may explain why you are not receiving or following treatment.

I. How do we use the functional criteria in these listings?

1. The following listings in this body system include standards for evaluating the functional limitations resulting from immune system disorders: 14.02B, for systemic lupus erythematosus; 14.03B, for systemic vasculitis; 14.04D, for systemic sclerosis (scleroderma); 14.05E, for polymyositis and dermatomyositis; 14.06B, for undifferentiated and mixed connective tissue disease; 14.07C, for immune deficiency disorders, excluding HIV infection; 14.08K, for HIV infection; 14.09D, for inflammatory arthritis; and 14.10B, for Sjögren's syndrome.

2. When we use one of the listings cited in 14.00I1, we will consider all relevant information in your case record to determine the full impact of your immune system disorder on your ability to function on a sustained basis. Important factors we will consider when we evaluate your functioning under these listings include, but are not limited to: Your symptoms, the frequency and duration of manifestations of your immune system disorder, periods of exacerbation and remission, and the functional impact of your treatment, including the side effects of your medication.

3. As used in these listings, ''repeated'' means that the manifestations occur on an average of three times a year, or once every 4 months, each lasting 2 weeks or more; or the manifestations do not last for 2 weeks but occur substantially more frequently than three times in a year or once every 4 months; or they occur less frequently than an average of three times a year or once every 4 months but last substantially longer than 2 weeks. Your impairment will satisfy this criterion regardless of whether you have the same kind of manifestation repeatedly, all different manifestations, or any other combination of manifestations; for example, two of the same kind of manifestation and a different one. You must have the required number of manifestations with the frequency and duration required in this section. Also, the manifestations must occur within the period covered by your claim.

4. To satisfy the functional criterion in a listing, your immune system disorder must result in a ''marked'' level of limitation in one of three general areas of functioning: Activities of daily living, social functioning, or difficulties in completing tasks due to deficiencies in concentration, persistence, or pace. Functional limitation may result from the impact of the disease process itself on your mental functioning, physical functioning, or both your mental and physical functioning. This could result from persistent or intermittent symptoms, such as depression, severe fatigue, or pain, resulting in a limitation of your ability to do a task, to concentrate, to persevere at a task, or to perform the task at an acceptable rate of speed. You may also have limitations because of your treatment and its side effects (see 14.00G).

5. When ''marked'' is used as a standard for measuring the degree of functional limitation, it means more than moderate but less than extreme. We do not define ''marked'' by a specific number of different activities of daily living in which your functioning is impaired, different behaviors in which your social functioning is impaired, or tasks that you are able to complete, but by the nature and overall degree of interference with your functioning. You may have a marked limitation when several activities or functions are impaired, or even when only one is impaired. Also, you need not be totally precluded from performing an activity to have a marked limitation, as long as the degree of limitation seriously interferes with your ability to function independently, appropriately, and effectively. The term ''marked'' does not imply that you must be confined to bed, hospitalized, or in a nursing home.

6. *Activities of daily living* include, but are not limited to, such activities as doing household chores, grooming and hygiene, using a post office, taking public transportation, or paying bills. We will find that you have a ''marked'' limitation of activities of daily living if you have a serious limitation in your ability to maintain a household or take public transportation because of symptoms, such as pain, severe fatigue, anxiety, or difficulty concentrating, caused by your immune system disorder (including manifestations of the disorder) or its treatment, even if you are able to perform some self-care activities.

7. *Social functioning* includes the capacity to interact independently, appropriately, effectively, and on a sustained basis with others. It includes the ability to communicate effectively with others. We will find that you have a ''marked'' limitation in maintaining social functioning if you have a serious limitation in social interaction on a sustained basis because of symptoms, such as pain, severe fatigue, anxiety, or difficulty concentrating, or a pattern of exacerbation and remission, caused by your immune system disorder (including manifestations of the disorder) or its treatment, even if you are able to communicate with close friends or relatives.

8. *Completing tasks in a timely manner* involves the ability to sustain concentration, persistence, or pace to permit timely completion of tasks commonly found in work settings. We will find that you have a ''marked'' limitation in completing tasks if you have a serious limitation in your ability to sustain concentration or pace adequate to complete work-related tasks because of symptoms, such as pain, severe fatigue, anxiety, or difficulty concentrating, caused by your immune system disorder (including manifestations of the disorder) or its treatment, even if you are able to do some routine activities of daily living.

J. How do we evaluate your immune system disorder when it does not meet one of these listings?

1. These listings are only examples of immune system disorders that we consider severe enough to prevent you from doing any gainful activity. If your impairment(s) does not meet the criteria of any of these listings, we must also consider whether you have an impairment(s) that satisfies the criteria of a listing in another body system.

2. Individuals with immune system disorders, including HIV infection, may manifest signs or symptoms of a mental impairment or of another physical impairment. We may evaluate these impairments under any affected body system. For example, we will evaluate:

a. Musculoskeletal involvement, such as surgical reconstruction of a joint, under 1.00.

b. Ocular involvement, such as dry eye, under 2.00.

c. Respiratory impairments, such as pleuritis, under 3.00.

d. Cardiovascular impairments, such as cardiomyopathy, under 4.00.

e. Digestive impairments, such as hepatitis (including hepatitis C) or weight loss as a result of HIV infection that affects the digestive system, under 5.00.

f. Genitourinary impairments, such as nephropathy, under 6.00.

g. Hematologic abnormalities, such as anemia, granulocytopenia, and thrombocytopenia, under 7.00.

h. Skin impairments, such as persistent fungal and other infectious skin eruptions, and photosensitivity, under 8.00.

i. Neurologic impairments, such as neuropathy or seizures, under 11.00.

j. Mental disorders, such as depression, anxiety, or cognitive deficits, under 12.00.

k. Allergic disorders, such as asthma or atopic dermatitis, under 3.00 or 8.00 or under the criteria in another affected body system.

l. Syphilis or neurosyphilis under the criteria for the affected body system; for example, 2.00 Special senses and speech, 4.00 Cardiovascular system, or 11.00 Neurological.

3. If you have a severe medically determinable impairment(s) that does not meet a listing, we will determine whether your impairment(s) medically equals a listing. (See §§ 404.1526 and 416.926.) If it does not, you may or may not have the residual functional capacity to engage in substantial gainful activity. Therefore, we proceed to the fourth, and if necessary, the fifth steps of the sequential evaluation process in §§ 404.1520 and 416.920. We use the rules in §§ 404.1594, 416.994, and 416.994a as appropriate, when we decide whether you continue to be disabled.

14.01 *Category of Impairments, Immune System Disorders.*

14.02 *Systemic lupus erythematosus.* As described in 14.00D1. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity; and

2. At least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss).

or

B. Repeated manifestations of SLE, with at least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss) and one of the following at the marked level:

1. Limitation of activities of daily living.

2. Limitation in maintaining social functioning.

3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

14.03 *Systemic vasculitis.* As described in 14.00D2. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity; and

2. At least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss).

or

B. Repeated manifestations of systemic vasculitis, with at least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss) and one of the following at the marked level:

1. Limitation of activities of daily living.

2. Limitation in maintaining social functioning.

3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

14.04 *Systemic sclerosis (scleroderma).* As described in 14.00D3. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity; and

2. At least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss).

or

B. With one of the following:

1. Toe contractures or fixed deformity of one or both feet, resulting in the inability to ambulate effectively as defined in 14.00C6; or

2. Finger contractures or fixed deformity in both hands, resulting in the inability to perform fine and gross movements effectively as defined in 14.00C7; or

3. Atrophy with irreversible damage in one or both lower extremities, resulting in the inability to ambulate effectively as defined in 14.00C6; or

4. Atrophy with irreversible damage in both upper extremities, resulting in the inability to perform fine and gross movements effectively as defined in 14.00C7.

or

C. Raynaud's phenomenon, characterized by:

1. Gangrene involving at least two extremities; or

2. Ischemia with ulcerations of toes or fingers, resulting in the inability to ambulate effectively or to perform fine and gross movements effectively as defined in 14.00C6 and 14.00C7;

or

D. Repeated manifestations of systemic sclerosis (scleroderma), with at least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss) and one of the following at the marked level:

1. Limitation of activities of daily living.

2. Limitation in maintaining social functioning.

3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

14.05 *Polymyositis and dermatomyositis.* As described in 14.00D4. With:

A. Proximal limb-girdle (pelvic or shoulder) muscle weakness, resulting in inability to ambulate effectively or inability to perform fine and gross movements effectively as defined in 14.00C6 and 14.00C7.

or

B. Impaired swallowing (dysphagia) with aspiration due to muscle weakness.

or

C. Impaired respiration due to intercostal and diaphragmatic muscle weakness.

or

D. Diffuse calcinosis with limitation of joint mobility or intestinal motility.

or

E. Repeated manifestations of polymyositis or dermatomyositis, with at least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss) and one of the following at the marked level:

1. Limitation of activities of daily living.

2. Limitation in maintaining social functioning.

3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

14.06 *Undifferentiated and mixed connective tissue disease.* As described in 14.00D5. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity; and

2. At least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss).

or

B. Repeated manifestations of undifferentiated or mixed connective tissue disease, with at least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss) and one of the following at the marked level:

1. Limitation of activities of daily living.

2. Limitation in maintaining social functioning.

3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

14.07 *Immune deficiency disorders, excluding HIV infection.* As described in 14.00E. With:

A. One or more of the following infections. The infection(s) must either be resistant to treatment or require hospitalization or intravenous treatment three or more times in a 12-month period.

1. Sepsis; or

2. Meningitis; or

3. Pneumonia; or

4. Septic arthritis; or

5. Endocarditis; or

6. Sinusitis documented by appropriate medically acceptable imaging.

or

B. Stem cell transplantation as described under 14.00E3. Consider under a disability until at least 12 months from the date of transplantation. Thereafter, evaluate any residual impairment(s) under the criteria for the affected body system.

or

C. Repeated manifestations of an immune deficiency disorder, with at least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss) and one of the following at the marked level:

1. Limitation of activities of daily living.

2. Limitation in maintaining social function.

3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

14.08 *Human immunodeficiency virus (HIV) infection.* With documentation as described in 14.00F and one of the following:

A. Bacterial infections:

1. Mycobacterial infection (for example, caused by *M. avium-intracellulare, M. kansasii,* or *M. tuberculosis*) at a site other than the lungs, skin, or cervical or hilar lymph nodes, or pulmonary tuberculosis resistant to treatment; or

2. Nocardiosis; or

3. *Salmonella* bacteremia, recurrent non-typhoid; or

4. Multiple or recurrent bacterial infections, including pelvic inflammatory disease, requiring hospitalization or intravenous antibiotic treatment three or more times in a 12-month period. or

B. Fungal infections:

1. Aspergillosis; or

2. Candidiasis involving the esophagus, trachea, bronchi, or lungs, or at a site other than the skin, urinary tract, intestinal tract, or oral or vulvovaginal mucous membranes; or

3. Coccidioidomycosis, at a site other than the lungs or lymph nodes; or

4. Cryptococcosis, at a site other than the lungs (for example, cryptococcal meningitis); or

5. Histoplasmosis, at a site other than the lungs or lymph nodes; or

6. Mucormycosis; or

7. *Pneumocystis* pneumonia or extrapulmonary *Pneumocystis* infection. or

C. Protozoan or helminthic infections:

1. Cryptosporidiosis, isosporiasis, or microsporidiosis, with diarrhea lasting for 1 month or longer; or

2. Strongyloidiasis, extra-intestinal; or

3. Toxoplasmosis of an organ other than the liver, spleen, or lymph nodes. or

D. Viral infections:

1. *Cytomegalovirus* disease (documented as described in 14.00F3b(ii)) at a site other than the liver, spleen or lymph nodes; or

2. Herpes simplex virus causing:

a. Mucocutaneous infection (for example, oral, genital, perianal) lasting for 1 month or longer; or

b. Infection at a site other than the skin or mucous membranes (for example, bronchitis, pneumonitis, esophagitis, or encephalitis); or

c. Disseminated infection; or

3. Herpes zoster:

a. Disseminated; or

b. With multidermatomal eruptions that are resistant to treatment; or

4. Progressive multifocal leukoencephalopathy.

or

E. Malignant neoplasms:

1. Carcinoma of the cervix, invasive, FIGO stage II and beyond; or

2. Kaposi's sarcoma with:

a. Extensive oral lesions; or

b. Involvement of the gastrointestinal tract, lungs, or other visceral organs; or

3. Lymphoma (for example, primary lymphoma of the brain, Burkitt's lymphoma, immunoblastic sarcoma, other non-Hodgkin's lymphoma, Hodgkin's disease); or

4. Squamous cell carcinoma of the anal canal or anal margin.

or

F. Conditions of the skin or mucous membranes (other than described in B2, D2, or D3, above), with extensive fungating or ulcerating lesions not responding to treatment (for example, dermatological conditions such as eczema or psoriasis, vulvovaginal or other mucosal *Candida,* condyloma caused by human *Papillomavirus,* genital ulcerative disease).

or

G. HIV encephalopathy, characterized by cognitive or motor dysfunction that limits function and progresses.

or

H. HIV wasting syndrome, characterized by involuntary weight loss of 10 percent or more of baseline (computed based on pounds, kilograms, or body mass index (BMI)) or other significant involuntary weight loss as described in 14.00F5, and in the absence of a concurrent illness that could explain the findings. With either:

1. Chronic diarrhea with two or more loose stools daily lasting for 1 month or longer; or

2. Chronic weakness and documented fever greater than 38°C (100.4°F) for the majority of 1 month or longer.

or

I. Diarrhea, lasting for 1 month or longer, resistant to treatment, and requiring intravenous hydration, intravenous alimentation, or tube feeding.

or

J. One or more of the following infections (other than described in A-I, above). The infection(s) must either be resistant to treatment or require hospitalization or intravenous treatment three or more times in a 12-month period.

1. Sepsis; or

2. Meningitis; or

3. Pneumonia; or

4. Septic arthritis; or

5. Endocarditis; or

6. Sinusitis documented by appropriate medically acceptable imaging.

or

K. Repeated (as defined in 14.00I3) manifestations of HIV infection, including those listed in 14.08A–J, but without the requisite findings for those listings (for example, carcinoma of the cervix not meeting the criteria in 14.08E, diarrhea not meeting the criteria in 14.08I), or other manifestations (for example, oral hairy leukoplakia, myositis, pancreatitis, hepatitis, peripheral neuropathy, glucose intolerance, muscle weakness, cognitive or other mental limitation) resulting in significant, documented symptoms or signs (for example, severe fatigue, fever, malaise, involuntary weight loss, pain, night sweats, nausea, vomiting, headaches, or insomnia) and one of the following at the marked level:

1. Limitation of activities of daily living.

2. Limitation in maintaining social functioning.

3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

14.09 *Inflammatory arthritis.* As described in 14.00D6. With:

A. Persistent inflammation or persistent deformity of:

1. One or more major peripheral weight-bearing joints resulting in the inability to ambulate effectively (as defined in 14.00C6); or

2. One or more major peripheral joints in each upper extremity resulting in the inability to perform fine and gross movements effectively (as defined in 14.00C7).

or

B. Inflammation or deformity in one or more major peripheral joints with:

1. Involvement of two or more organs/body systems with one of the organs/body systems involved to at least a moderate level of severity; and

2. At least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss).

or

C. Ankylosing spondylitis or other spondyloarthropathies, with:

1. Ankylosis (fixation) of the dorsolumbar or cervical spine as shown by appropriate medically acceptable imaging and measured on physical examination at 45° or more of flexion from the vertical position (zero degrees); or

2. Ankylosis (fixation) of the dorsolumbar or cervical spine as shown by appropriate medically acceptable imaging and measured on physical examination at 30° or more of flexion (but less than 45°) measured from the vertical position (zero degrees), and involvement of two or more organs/body systems with one of the organs/body systems involved to at least a moderate level of severity.

or

D. Repeated manifestations of inflammatory arthritis, with at least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss) and one of the following at the marked level:

1. Limitation of activities of daily living.

2. Limitation in maintaining social functioning.

3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

14.10 *Sjögren's syndrome.* As described in 14.00D7. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity; and

2. At least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss).

or

B. Repeated manifestations of Sjögren's syndrome, with at least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss) and one of the following at the marked level:

1. Limitation of activities of daily living.

2. Limitation in maintaining social functioning.

3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

Part B

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114.00 Immune System Disorders.

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101.00 MUSCULOSKELETAL SYSTEM

* * * * *

B. * * *

1. * * * The provisions of 101.02 and 101.03 notwithstanding, inflammatory arthritis is evaluated under 114.09 (see 114.00D6). * * *

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L. * * * When the abnormal curvature of the spine results in symptoms related to

fixation of the dorsolumbar or cervical spine, evaluation of equivalence may be made by reference to 114.09C. * * *

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108.00 SKIN DISORDERS

* * * * *

D. * * *

3. *Autoimmune disorders and other immune system disorders* (for example, systemic lupus erythematosus (SLE), scleroderma, human immunodeficiency virus (HIV) infection, and Sjögren's syndrome) often involve more than one body system. We first evaluate these disorders under the immune system disorders listings in 114.00. We evaluate SLE under 114.02, scleroderma under 114.04, HIV infection under 114.08, and Sjögren's syndrome under 114.10.

* * * * *

113.00 MALIGNANT NEOPLASTIC DISEASES

A. * * * We use the criteria in 114.08E to evaluate carcinoma of the cervix, Kaposi's sarcoma, lymphoma, and squamous cell carcinoma of the anal canal and anal margin if you also have HIV infection.

* * * * *

114.00 IMMUNE SYSTEM DISORDERS

A. What disorders do we evaluate under the immune system disorders listings?

1. *We evaluate immune system disorders that cause dysfunction in one or more components of your immune system.*

a. The dysfunction may be due to problems in antibody production, impaired cell-mediated immunity, a combined type of antibody/cellular deficiency, impaired phagocytosis, or complement deficiency.

b. Immune system disorders may result in recurrent and unusual infections, or inflammation and dysfunction of the body's own tissues. Immune system disorders can cause a deficit in a single organ or body system that results in extreme (that is, very serious) loss of function. They can also cause lesser degrees of limitations in two or more organs or body systems, and when associated with symptoms or signs, such as severe fatigue, fever, malaise, diffuse musculoskeletal pain, or involuntary weight loss, can also result in extreme limitation. In children, immune system disorders or their treatment may also affect growth, development, and the performance of age-appropriate activities.

c. We organize the discussions of immune system disorders in three categories: Autoimmune disorders; Immune deficiency disorders, excluding human immunodeficiency virus (HIV) infection; and HIV infection.

2. *Autoimmune disorders (114.00D).* Autoimmune disorders are caused by dysfunctional immune responses directed against the body's own tissues, resulting in chronic, multisystem impairments that differ in clinical manifestations, course, and outcome. They are sometimes referred to as rheumatic diseases, connective tissue disorders, or collagen vascular disorders. Some of the features of autoimmune disorders in children differ from the features of the same disorders in adults. The impact of the disorders or their treatment on physical, psychological, and developmental growth of pre-pubertal children may be considerable, and often differs from that of post-pubertal adolescents or adults.

3. *Immune deficiency disorders, excluding HIV infection (114.00E).* Immune deficiency disorders are characterized by recurrent or unusual infections that respond poorly to treatment, and are often associated with complications affecting other parts of the body. Immune deficiency disorders are classified as either *primary* (congenital) or *acquired*. Children with immune deficiency disorders also have an increased risk of malignancies and of having autoimmune disorders.

4. *Human immunodeficiency virus (HIV) infection (114.00F).* HIV infection may be characterized by increased susceptibility to opportunistic infections, cancers, or other conditions, as described in 114.08.

B. What information do we need to show that you have an immune system disorder?

Generally, we need your medical history, a report(s) of a physical examination, a report(s) of laboratory findings, and in some instances, appropriate medically acceptable imaging or tissue biopsy reports to show that you have an immune system disorder. Therefore, we will make every reasonable effort to obtain your medical history, medical findings, and results of laboratory tests. We explain the information we need in more detail in the sections below.

C. Definitions

1. *Appropriate medically acceptable imaging* includes, but is not limited to, angiography, x-ray imaging, computerized axial tomography (CAT scan) or magnetic resonance imaging (MRI), with or without contrast material, myelography, and radionuclear bone scans. ''Appropriate'' means that the technique used is the proper one to support the evaluation and diagnosis of the impairment.

2. *Constitutional symptoms or signs,* as used in these listings, means severe fatigue, fever, malaise, or involuntary weight loss. *Severe fatigue* means a frequent sense of exhaustion that results in significantly reduced physical activity or mental function. *Malaise* means frequent feelings of illness, bodily discomfort, or lack of well-being that result in significantly reduced physical activity or mental function.

3. *Disseminated* means that a condition is spread over a considerable area. The type and extent of the spread will depend on your specific disease.

4. *Dysfunction* means that one or more of the body regulatory mechanisms are impaired, causing either an excess or deficiency of immunocompetent cells or their products.

5. *Extra-articular* means ''other than the joints''; for example, an organ(s) such as the heart, lungs, kidneys, or skin.

6. *Inability to ambulate effectively* has the same meaning as in 101.00B2b.

7. *Inability to perform fine and gross movements effectively* has the same meaning as in 101.00B2c.

8. *Major peripheral joints* has the same meaning as in 101.00F.

9. *Persistent* means that a sign(s) or symptom(s) has continued over time. The precise meaning will depend on the specific immune system disorder, the usual course of the disorder, and the other circumstances of your clinical course.

10. *Recurrent* means that a condition that previously responded adequately to an appropriate course of treatment returns after a period of remission or regression. The precise meaning, such as the extent of response or remission and the time periods involved, will depend on the specific disease or condition you have, the body system affected, the usual course of the disorder and its treatment, and the other facts of your particular case.

11. *Resistant to treatment* means that a condition did not respond adequately to an appropriate course of treatment. Whether a response is adequate or a course of treatment is appropriate will depend on the specific disease or condition you have, the body system affected, the usual course of the disorder and its treatment, and the other facts of your particular case.

12. *Severe* means medical severity as used by the medical community. The term does not have the same meaning as it does when we use it in connection with a finding at the second step of the sequential evaluation process in § 416.924.

D. How do we document and evaluate the listed autoimmune disorders?

1. *Systemic lupus erythematosus (114.02).*

a. *General.* Systemic lupus erythematosus (SLE) is a chronic inflammatory disease that can affect any organ or body system. It is frequently, but not always, accompanied by constitutional symptoms or signs (severe fatigue, fever, malaise, involuntary weight loss). Major organ or body system involvement can include: Respiratory (pleuritis, pneumonitis), cardiovascular (endocarditis, myocarditis, pericarditis, vasculitis), renal (glomerulonephritis), hematologic (anemia, leukopenia, thrombocytopenia), skin (photosensitivity), neurologic (seizures), mental (anxiety, fluctuating cognition (''lupus fog''), mood disorders, organic brain syndrome, psychosis), or immune system disorders (inflammatory arthritis). Immunologically, there is an array of circulating serum auto-antibodies and pro- and anti-coagulant proteins that may occur in a highly variable pattern.

b. *Documentation of SLE.* Generally, but not always, the medical evidence will show that your SLE satisfies the criteria in the current ''Criteria for the Classification of Systemic Lupus Erythematosus'' by the American College of Rheumatology found in the most recent edition of the *Primer on the Rheumatic Diseases* published by the Arthritis Foundation.

2. *Systemic vasculitis (114.03).*

a. *General.*

(i) Vasculitis is an inflammation of blood vessels. It may occur acutely in association with adverse drug reactions, certain chronic infections, and occasionally, malignancies. More often, it is chronic and the cause is unknown. Symptoms vary depending on which blood vessels are involved. Systemic

vasculitis may also be associated with other autoimmune disorders; for example, SLE or dermatomyositis.

(ii) Children can develop the vasculitis of Kawasaki disease, of which the most serious manifestation is formation of coronary artery aneurysms and related complications. We evaluate heart problems related to Kawasaki disease under the criteria in the cardiovascular listings (104.00). Children can also develop the vasculitis of anaphylactoid purpura (Henoch-Schoenlein purpura), which may cause intestinal and renal disorders. We evaluate intestinal and renal disorders related to vasculitis of anaphylactoid purpura under the criteria in the digestive (105.00) or genitourinary (106.00) listings. Other clinical patterns include, but are not limited to, polyarteritis nodosa, Takayasu's arteritis (aortic arch arteritis), and Wegener's granulomatosis.

b. *Documentation of systemic vasculitis.* Angiography or tissue biopsy confirms a diagnosis of systemic vasculitis when the disease is suspected clinically. When you have had angiography or tissue biopsy for systemic vasculitis, we will make every reasonable effort to obtain reports of the results of that procedure. However, we will not purchase angiography or tissue biopsy.

3. *Systemic sclerosis (scleroderma) (114.04).*

a. *General.* Systemic sclerosis (scleroderma) constitutes a spectrum of disease in which thickening of the skin is the clinical hallmark. Raynaud's phenomenon, often medically severe and progressive, is present frequently and may be the peripheral manifestation of a vasospastic abnormality in the heart, lungs, and kidneys. The CREST syndrome (calcinosis, Raynaud's phenomenon, esophageal dysmotility, sclerodactyly, and telangiectasia) is a variant that may slowly progress over years to the generalized process, systemic sclerosis.

b. *Diffuse cutaneous systemic sclerosis.* In diffuse cutaneous systemic sclerosis (also known as diffuse scleroderma), major organ or systemic involvement can include the gastrointestinal tract, lungs, heart, kidneys, and muscle in addition to skin or blood vessels. Although arthritis can occur, joint dysfunction results primarily from soft tissue/cutaneous thickening, fibrosis, and contractures.

c. *Localized scleroderma (linear scleroderma and morphea).*

(i) Localized scleroderma (linear scleroderma and morphea) is more common in children than systemic scleroderma. To assess the severity of the impairment, we need a description of the extent of involvement of linear scleroderma and the location of the lesions. For example, linear scleroderma involving the arm but not crossing any joints is not as functionally limiting as sclerodactyly (scleroderma localized to the fingers). Linear scleroderma of a lower extremity involving skin thickening and atrophy of underlying muscle or bone can result in contractures and leg length discrepancy. In such cases, we may evaluate your impairment under the musculoskeletal listings (101.00).

(ii) When there is isolated morphea of the face causing facial disfigurement from unilateral hypoplasia of the mandible, maxilla, zygoma, or orbit, adjudication may be more appropriate under the criteria in the affected body system, such as special senses and speech (102.00) or mental disorders (112.00).

(iii) Chronic variants of these syndromes include disseminated morphea, Shulman's disease (diffuse fasciitis with eosinophilia), and eosinophilia-myalgia syndrome (often associated with toxins such as toxic oil or contaminated tryptophan), all of which can impose medically severe musculoskeletal dysfunction and may also lead to restrictive pulmonary disease. We evaluate these variants of the disease under the criteria in the musculoskeletal listings (101.00) or respiratory system listings (103.00).

d. *Documentation of systemic sclerosis (scleroderma).* Documentation involves differentiating the clinical features of systemic sclerosis (scleroderma) from other autoimmune disorders. However, there may be an overlap.

4. *Polymyositis and dermatomyositis (114.05).*

a. *General.*

(i) Polymyositis and dermatomyositis are related disorders that are characterized by an inflammatory process in striated muscle, occurring alone or in association with other autoimmune disorders. The most common manifestations are symmetric weakness, and less frequently, pain and tenderness of the proximal limb-girdle (shoulder or pelvic) musculature. There may also be involvement of the cervical, cricopharyngeal, esophageal, intercostal, and diaphragmatic muscles.

(ii) Polymyositis occurs rarely in children; the more common presentation in children is dermatomyositis with symmetric proximal muscle weakness and characteristic skin findings. The clinical course of dermatomyositis can be more severe when it is accompanied by systemic vasculitis rather than just localized to striated muscle. Late in the disease, some children with dermatomyositis develop calcinosis of the skin and subcutaneous tissues, muscles, and joints. We evaluate the involvement of other organs/body systems under the criteria for the listings in the affected body system.

b. *Documentation of polymyositis and dermatomyositis.* Generally, but not always, polymyositis is associated with elevated serum muscle enzymes (creatine phosphokinase (CPK), aminotransferases, and aldolase), and characteristic abnormalities on electromyography and muscle biopsy. In children, the diagnosis of dermatomyositis is supported largely by medical history, findings on physical examination that include the characteristic skin findings, and elevated serum muscle enzymes. Muscle inflammation or vasculitis depicted on MRI is additional evidence supporting the diagnosis of childhood dermatomyositis. When you have had electromyography, muscle biopsy, or MRI for polymyositis or dermatomyositis, we will make every reasonable effort to obtain reports of the results of that procedure. However, we will not purchase electromyography, muscle biopsy, or MRI.

c. *Additional information about how we evaluate polymyositis and dermatomyositis under the listings.*

(i) In newborn and younger infants (birth to attainment of age 1), we consider muscle weakness that affects motor skills, such as head control, reaching, grasping, taking solids, or self-feeding, under 114.05A. In older infants and toddlers (age 1 to attainment of age 3), we also consider muscle weakness affecting your ability to roll over, sit, crawl, or walk under 114.05A.

(ii) If you are of preschool age through adolescence (age 3 to attainment of age 18), weakness of your pelvic girdle muscles that results in your inability to rise independently from a squatting or sitting position or to climb stairs may be an indication that you are unable to ambulate effectively. Weakness of your shoulder girdle muscles may result in your inability to perform lifting, carrying, and reaching overhead, and also may seriously affect your ability to perform activities requiring fine movements. We evaluate these limitations under 114.05A.

5. *Undifferentiated and mixed connective tissue disease (114.06).*

a. *General.* This listing includes syndromes with clinical and immunologic features of several autoimmune disorders, but which do not satisfy the criteria for any of the specific disorders described. For example, you may have clinical features of SLE and systemic vasculitis, and the serologic (blood test) findings of rheumatoid arthritis. The most common pattern of undifferentiated autoimmune disorders in children is mixed connective tissue disease (MCTD).

b. *Documentation of undifferentiated and mixed connective tissue disease.* Undifferentiated connective tissue disease is diagnosed when clinical features and serologic (blood test) findings, such as rheumatoid factor or antinuclear antibody (consistent with an autoimmune disorder) are present but do not satisfy the criteria for a specific disease. Children with MCTD have laboratory findings of extremely high antibody titers to extractable nuclear antigen (ENA) or ribonucleoprotein (RNP) without high titers of anti-dsDNA or anti-SM antibodies. There are often clinical findings suggestive of SLE or childhood dermatomyositis. Many children later develop features of scleroderma.

6. *Inflammatory arthritis (114.09).*

a. *General.* The spectrum of inflammatory arthritis includes a vast array of disorders that differ in cause, course, and outcome. Clinically, inflammation of major peripheral joints may be the dominant manifestation causing difficulties with ambulation or fine and gross movements; there may be joint pain, swelling, and tenderness. The arthritis may affect other joints, or cause less limitation in ambulation or the performance of fine and gross movements. However, in combination with extra-articular features, including constitutional symptoms or signs (severe fatigue, fever, malaise, involuntary weight loss), inflammatory arthritis may result in an extreme limitation. You may also have impaired growth as a result of the inflammatory arthritis because of its effects on the immature skeleton, open epiphyses, and young cartilage and bone. We evaluate any associated growth impairment under the criteria in 100.00.

b. *Inflammatory arthritis involving the axial spine (spondyloarthropathy).* In

children, inflammatory arthritis involving the axial spine may be associated with disorders such as:

(i) Reactive arthropathies;

(ii) Juvenile ankylosing spondylitis;

(iii) Psoriatic arthritis;

(iv) SEA syndrome (seronegative enthesopathy arthropathy syndrome);

(v) Behçet's disease; and

(vi) Inflammatory bowel disease.

c. *Inflammatory arthritis involving the peripheral joints.* In children, inflammatory arthritis involving peripheral joints may be associated with disorders such as:

(i) Juvenile rheumatoid arthritis;

(ii) Sjögren's syndrome;

(iii) Psoriatic arthritis;

(iv) Crystal deposition disorders (gout and pseudogout);

(v) Lyme disease; and

(vi) Inflammatory bowel disease.

d. *Documentation of inflammatory arthritis.* Generally, but not always, the diagnosis of inflammatory arthritis is based on the clinical features and serologic findings described in the most recent edition of the *Primer on the Rheumatic Diseases* published by the Arthritis Foundation.

e. *How we evaluate inflammatory arthritis under the listings.*

(i) Listing-level severity in 114.09A and 114.09C1 is shown by an impairment that results in an ''extreme'' (very serious) limitation. In 114.09A, the criterion is satisfied with persistent inflammation or deformity in one major peripheral weight-bearing joint resulting in the inability to ambulate effectively (as defined in 114.00C6) or one major peripheral joint in each upper extremity resulting in the inability to perform fine and gross movements effectively (as defined in 114.00C7). In 114.09C1, if you have the required ankylosis (fixation) of your cervical or dorsolumbar spine, we will find that you have an extreme limitation in your ability to see in front of you, above you, and to the side. Therefore, inability to ambulate effectively is implicit in 114.09C1, even though you might not require bilateral upper limb assistance.

(ii) Listing-level severity is shown in 114.09B, 114.09C2, and 114.09D by inflammatory arthritis that involves various combinations of complications of one or more major peripheral joints or involves other joints, such as inflammation or deformity, extra-articular features, repeated manifestations, and constitutional symptoms and signs. Extra-articular impairments may also meet listings in other body systems.

(iii) Extra-articular features of inflammatory arthritis may involve any body system; for example: Musculoskeletal (heel enthesopathy), ophthalmologic (iridocyclitis, keratoconjunctivitis sicca, uveitis), pulmonary (pleuritis, pulmonary fibrosis or nodules, restrictive lung disease), cardiovascular (aortic valve insufficiency, arrhythmias, coronary arteritis, myocarditis, pericarditis, Raynaud's phenomenon, systemic vasculitis), renal (amyloidosis of the kidney), hematologic (chronic anemia, thrombocytopenia), neurologic (peripheral neuropathy, radiculopathy, spinal cord or cauda equina compression with sensory and motor loss), mental (cognitive dysfunction, poor memory), and immune system (Felty's syndrome (hypersplenism with compromised immune competence)).

(iv) If both inflammation and chronic deformities are present, we evaluate your impairment under the criteria of any appropriate listing.

7. *Sjögren's syndrome (114.10).*

a. *General.*

(i) Sjögren's syndrome is an immune-mediated disorder of the exocrine glands. Involvement of the lacrimal and salivary glands is the hallmark feature, resulting in symptoms of dry eyes and dry mouth, and possible complications, such as corneal damage, blepharitis (eyelid inflammation), dysphagia (difficulty in swallowing), dental caries, and the inability to speak for extended periods of time. Involvement of the exocrine glands of the upper airways may result in persistent dry cough.

(ii) Many other organ systems may be involved, including musculoskeletal (arthritis, myositis), respiratory (interstitial fibrosis), gastrointestinal (dysmotility, dysphagia, involuntary weight loss), genitourinary (interstitial cystitis, renal tubular acidosis), skin (purpura, vasculitis,), neurologic (central nervous system disorders, cranial and peripheral neuropathies), mental (cognitive dysfunction, poor memory), and neoplastic (lymphoma). Severe fatigue and malaise are frequently reported. Sjögren's syndrome may be associated with other autoimmune disorders (for example, rheumatoid arthritis or SLE); usually the clinical features of the associated disorder predominate.

b. *Documentation of Sjögren's syndrome.* If you have Sjögren's syndrome, the medical evidence will generally, but not always, show that your disease satisfies the criteria in the current ''Criteria for the Classification of Sjögren's Syndrome'' by the American College of Rheumatology found in the most recent edition of the *Primer on the Rheumatic Diseases* published by the Arthritis Foundation.

E. How do we document and evaluate immune deficiency disorders, excluding HIV infection?

1. *General.*

a. Immune deficiency disorders can be classified as:

(i) *Primary* (congenital); for example, X-linked agammaglobulinemia, thymic hypoplasia (DiGeorge syndrome), severe combined immunodeficiency (SCID), chronic granulomatous disease (CGD), C1 esterase inhibitor deficiency.

(ii) *Acquired;* for example, medication-related.

b. Primary immune deficiency disorders are seen mainly in children. However, recent advances in the treatment of these disorders have allowed many affected children to survive well into adulthood. Occasionally, these disorders are first diagnosed in adolescence or adulthood.

2. *Documentation of immune deficiency disorders.* The medical evidence must include documentation of the specific type of immune deficiency. Documentation may be by laboratory evidence or by other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice.

3. *Immune deficiency disorders treated by stem cell transplantation.*

a. *Evaluation in the first 12 months.* If you undergo stem cell transplantation for your immune deficiency disorder, we will consider you disabled until at least 12 months from the date of the transplant.

b. *Evaluation after the 12-month period has elapsed.* After the 12-month period has elapsed, we will consider any residuals of your immune deficiency disorder as well as any residual impairment(s) resulting from the treatment, such as complications arising from:

(i) Graft-versus-host (GVH) disease.

(ii) Immunosuppressant therapy, such as frequent infections.

(iii) Significant deterioration of other organ systems.

4. *Medication-induced immune suppression.* Medication effects can result in varying degrees of immune suppression, but most resolve when the medication is ceased. However, if you are prescribed medication for long-term immune suppression, such as after an organ transplant, we will evaluate:

a. The frequency and severity of infections.

b. Residuals from the organ transplant itself, after the 12-month period has elapsed.

c. Significant deterioration of other organ systems.

F. *How do we document and evaluate human immunodeficiency virus (HIV) infection?* Any child with HIV infection, including one with a diagnosis of acquired immune deficiency syndrome (AIDS), may be found disabled under 114.08 if his or her impairment meets the criteria in that listing or is medically equivalent to the criteria in that listing.

1. *Documentation of HIV infection.* The medical evidence must include documentation of HIV infection. Documentation may be by laboratory evidence or by other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice. When you have had laboratory testing for HIV infection, we will make every reasonable effort to obtain reports of the results of that testing. However, we will not purchase laboratory testing to establish whether you have HIV infection.

a. *Definitive documentation of HIV infection.* A definitive diagnosis of HIV infection is documented by one or more of the following laboratory tests:

(i) HIV antibody tests. HIV antibodies are usually first detected by an ELISA screening test performed on serum. Because the ELISA can yield false positive results, confirmation is required using a more definitive test, such as a Western blot or an immunofluorescence assay. Positive results on these tests are considered to be diagnostic of HIV infection in a child age 18 months or older. (See b. below for information about HIV antibody testing in children younger than 18 months of age.)

(ii) Positive ''viral load'' (VL) tests. These tests are normally used to quantitate the amount of the virus present but also document HIV infection. Such tests include the quantitative plasma HIV RNA,

quantitative plasma HIV branched DNA, and reverse transcriptase-polymerase chain reaction (RT–PCR).

(iii) HIV DNA detection by polymerase chain reaction (PCR).

(iv) A specimen that contains HIV antigen (for example, serum specimen, lymphocyte culture, or cerebrospinal fluid) in a child age 1 month or older.

(v) A positive viral culture for HIV from peripheral blood mononuclear cells (PBMC).

(vi) An immunoglobulin A (IgA) serological assay that is specific for HIV.

(vii) Other tests that are highly specific for detection of HIV and that are consistent with the prevailing state of medical knowledge.

b. *Definitive documentation of HIV infection in children from birth to the attainment of 18 months.* For children from birth to the attainment of 18 months of age, and who have tested positive for HIV antibodies, HIV infection is documented by:

(i) One or more of the tests listed in F1a(ii)–F1a(vii).

(ii) For newborn and younger infants (birth to attainment of age 1), a CD4 (T4) count of 1500/mm^3 or less, or a CD4 count less than or equal to 20 percent of total lymphocytes.

(iii) For older infants and toddlers from 12 to 18 months of age, a CD4 (T4) count of 750/mm^3 or less, or a CD4 count less than or equal to 20 percent of total lymphocytes.

(iv) An abnormal CD4/CD8 ratio.

(v) A severely diminished immunoglobulin G (IgG) level (< 4 g/l or 400 mg/dl), or significantly greater than normal range for age.

c. *Other acceptable documentation of HIV infection.* We may also document HIV infection without the definitive laboratory evidence described in 114.00F1a, provided that such documentation is consistent with the prevailing state of medical knowledge and clinical practice and is consistent with the other evidence in your case record. If no definitive laboratory evidence is available, we may document HIV infection by the medical history, clinical and laboratory findings, and diagnosis(es) indicated in the medical evidence. For example, we will accept a diagnosis of HIV infection without definitive laboratory evidence of the HIV infection if you have an opportunistic disease that is predictive of a defect in cell-mediated immunity (for example, *Pneumocystis* pneumonia (PCP)), and there is no other known cause of diminished resistance to that disease (for example, long-term steroid treatment, lymphoma). In such cases, we will make every reasonable effort to obtain full details of the history, medical findings, and results of testing.

2. *CD4 tests.* Children who have HIV infection or other disorders of the immune system may have tests showing a reduction of either the absolute count or the percentage of their T-helper lymphocytes (CD4 cells). The extent of immune suppression correlates with the level or rate of decline of the CD4 count (relative to the age of the young child). By age 6, children have CD4 counts comparable to those levels found in adults. Generally, in these children when the CD4 count is below 200/mm^3 (or below 14 percent of the total lymphocyte count) the susceptibility to opportunistic infection is greatly increased. Although a reduced CD4 count alone does not establish a definitive diagnosis of HIV infection, a CD4 count below 200 does offer supportive evidence when there are clinical findings, but not a definitive diagnosis of an opportunistic infection(s). However, a reduced CD4 count *alone* does not document the severity or functional consequences of HIV infection.

3. *Documentation of the manifestations of HIV infection.* The medical evidence must also include documentation of the manifestations of HIV infection. Documentation may be by laboratory evidence or other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice.

a. *Definitive documentation of the manifestations of HIV infection.* The definitive method of diagnosing opportunistic diseases or conditions that are manifestations of HIV infection is by culture, serologic test, or microscopic examination of biopsied tissue or other material (for example, bronchial washings). We will make every reasonable effort to obtain specific laboratory evidence of an opportunistic disease or other condition whenever this information is available. If a histologic or other test has been performed, the evidence should include a copy of the appropriate report. If we cannot obtain the report, the summary of hospitalization or a report from the treating source should include details of the findings and results of the diagnostic studies (including appropriate medically acceptable imaging studies) or microscopic examination of the appropriate tissues or body fluids.

b. *Other acceptable documentation of the manifestations of HIV infection.* We may also document manifestations of HIV infection without the definitive laboratory evidence described in 114.00F3a, provided that such documentation is consistent with the prevailing state of medical knowledge and clinical practice and is consistent with the other evidence in your case record. For example, many conditions are now commonly diagnosed based on some or all of the following: Medical history, clinical manifestations, laboratory findings (including appropriate medically acceptable imaging), and treatment responses. In such cases, we will make every reasonable effort to obtain full details of the history, medical findings, and results of testing. The following are examples of how we may document manifestations of HIV infection with other appropriate evidence.

(i) Although a definitive diagnosis of PCP requires identifying the organism in bronchial washings, induced sputum, or lung biopsy, these tests are frequently bypassed if PCP can be diagnosed presumptively. Supportive evidence may include: Fever, dyspnea, hypoxia, CD4 count below 200 in children 6 years of age or older, and no evidence of bacterial pneumonia. Also supportive are bilateral lung interstitial infiltrates on x-ray, a typical pattern on CAT scan, or a gallium scan positive for pulmonary uptake. Response to anti-PCP therapy usually requires 5–7 days, and such a response can be supportive of the diagnosis.

(ii) Documentation of *Cytomegalovirus* (CMV) disease (114.08D) may present special problems because definitive diagnosis (except for chorioretinitis, which may be diagnosed by an ophthalmologist or optometrist on funduscopic examination) requires identification of viral inclusion bodies or a positive culture from the affected organ and the absence of any other infectious agent likely to be causing the disease. A positive serology test does not establish a definitive diagnosis of CMV disease, but does offer supportive evidence of a presumptive diagnosis of CMV disease. Other clinical findings that support a presumptive diagnosis of CMV may include: Fever, urinary culture positive for CMV, and CD4 count below 200 in children 6 years of age or older. A clear response to anti-CMV therapy also supports a diagnosis.

(iii) A definitive diagnosis of toxoplasmosis of the brain is based on brain biopsy, but this procedure carries significant risk and is not commonly performed. This condition is usually diagnosed presumptively based on symptoms or signs of fever, headache, focal neurologic deficits, seizures, typical lesions on brain imaging, and a positive serology test.

(iv) Candidiasis of the esophagus (also known as *Candida* esophagitis) may be presumptively diagnosed based on symptoms of retrosternal pain on swallowing (odynophagia) and either oropharyngeal thrush (white patches or plaques) diagnosed on physical examination or by microscopic documentation of *Candida* fungal elements from a noncultured specimen scraped from the oral mucosa. Treatment with oral (systemic) antifungal agents usually produces improvement after 5 or more days of therapy, and such a response can be supportive of the diagnosis.

4. *HIV infection manifestations specific to children.*

a. *General.* The clinical manifestation and course of disease in children who become infected with HIV perinatally or in the first 12 years of life may differ from that in adolescents (age 12 to attainment of age 18) and adults. Newborn and younger infants (birth to attainment of age 1) and older infants and toddlers (age 1 to attainment of age 3) may present with failure to thrive or PCP; preschool children (age 3 to attainment of age 6) and primary school children (age 6 to attainment of age 12) may present with recurrent infections, neurological problems, or developmental abnormalities. Adolescents may also exhibit neurological abnormalities, such as HIV encephalopathy, or have growth problems. HIV infection that affects the digestive system and results in malnutrition also may be evaluated under 105.08.

b. *Neurologic abnormalities.* The methods of identifying and evaluating neurologic abnormalities may vary depending on a child's age. For example, in an infant, impaired brain growth can be documented by a decrease in the growth rate of the head. In an older child, impaired brain growth may be documented by brain atrophy on a CAT scan or MRI. Neurologic abnormalities in infants and young children may present as serious developmental delays or in the loss of previously acquired developmental

milestones. In school-age children and adolescents, this type of neurologic abnormality generally presents as the loss of previously acquired intellectual abilities. This may be evidenced in a child by a decrease in intelligence quotient (IQ) scores, by forgetting information previously learned, by inability to learn new information, or by a sudden onset of a new learning disability.

c. *Bacterial infections.* Children with HIV infection may contract any of a broad range of bacterial infections. Certain major infections caused by pyogenic bacteria (for example, some pneumonias) can be severely limiting, especially in pre-adolescent children. We evaluate these major bacterial infections under 114.08A4. Although 114.08A4 applies only to children under 13 years of age, children age 13 and older may have an impairment that medically equals this listing if the circumstances of the case warrant; for example, if there is delayed puberty. We will evaluate pelvic inflammatory disease in older girls under 114.08A5.

G. How do we consider the effects of treatment in evaluating your autoimmune disorder, immune deficiency disorder, or HIV infection?

1. *General.* If your impairment does not otherwise meet the requirements of a listing, we will consider your medical treatment in terms of its effectiveness in improving the signs, symptoms, and laboratory abnormalities of your specific immune system disorder or its manifestations, and in terms of any side effects that limit your functioning. We will make every reasonable effort to obtain a specific description of the treatment you receive (including surgery) for your immune system disorder. We consider:

a. The effects of medications you take.

b. Adverse side effects (acute and chronic).

c. The intrusiveness and complexity of your treatment (for example, the dosing schedule, need for injections).

d. The effect of treatment on your mental functioning (for example, cognitive changes, mood disturbance).

e. Variability of your response to treatment (see 114.00G2).

f. The interactive and cumulative effects of your treatments. For example, many children with immune system disorders receive treatment both for their immune system disorders and for the manifestations of the disorders or co-occurring impairments, such as treatment for HIV infection and hepatitis C. The interactive and cumulative effects of these treatments may be greater than the effects of each treatment considered separately.

g. The duration of your treatment.

h. Any other aspects of treatment that may interfere with your ability to function.

2. *Variability of your response to treatment.* Your response to treatment and the adverse or beneficial consequences of your treatment may vary widely. The effects of your treatment may be temporary or long term. For example, some children may show an initial positive response to a drug or combination of drugs followed by a decrease in effectiveness. When we evaluate your response to treatment and how your treatment may affect you, we consider such factors as disease activity before treatment, requirements for changes in therapeutic regimens, the time required for therapeutic effectiveness of a particular drug or drugs, the limited number of drug combinations that may be available for your impairment(s), and the time-limited efficacy of some drugs. For example, a child with HIV infection or another immune deficiency disorder who develops otitis media may not respond to the same antibiotic regimen used in treating children without HIV infection or another immune deficiency disorder, or may not respond to an antibiotic that he or she responded to before. Therefore, we must consider the effects of your treatment on an individual basis, including the effects of your treatment on your ability to function.

3. *How we evaluate the effects of treatment for autoimmune disorders on your ability to function.* Some medications may have acute or long-term side effects. When we consider the effects of corticosteroids or other treatments for autoimmune disorders on your ability to function, we consider the factors in 114.00G1 and 114.00G2. Long-term corticosteroid treatment can cause ischemic necrosis of bone, posterior subcapsular cataract, impaired growth, weight gain, glucose intolerance, increased susceptibility to infection, and osteopenia that may result in a loss of function. In addition, medications used in the treatment of autoimmune disorders may also have effects on mental functioning, including cognition (for example, memory), concentration, and mood.

4. *How we evaluate the effects of treatment for immune deficiency disorders, excluding HIV infection, on your ability to function.* When we consider the effects of your treatment for your immune deficiency disorder on your ability to function, we consider the factors in 114.00G1 and 114.00G2. A frequent need for treatment such as intravenous immunoglobulin and gamma interferon therapy can be intrusive and interfere with your ability to function. We will also consider whether you have chronic side effects from these or other medications, including severe fatigue, fever, headaches, high blood pressure, joint swelling, muscle aches, nausea, shortness of breath, or limitations in mental function including cognition (for example, memory) concentration, and mood.

5. *How we evaluate the effects of treatment for HIV infection on your ability to function.*

a. *General.* When we consider the effects of antiretroviral drugs (including the effects of highly active antiretroviral therapy (HAART)) and the effects of treatments for the manifestations of HIV infection on your ability to function, we consider the factors in 114.00G1 and 114.00G2. Side effects of antiretroviral drugs include, but are not limited to: Bone marrow suppression, pancreatitis, gastrointestinal intolerance (nausea, vomiting, diarrhea), neuropathy, rash, hepatotoxicity, lipodystrophy (fat redistribution, such as ''buffalo hump''), glucose intolerance, and lactic acidosis. In addition, medications used in the treatment of HIV infection may also have effects on mental functioning, including cognition (for example, memory), concentration, and mood, and may result in malaise, severe fatigue, joint and muscle pain, and insomnia. The symptoms of HIV infection and the side effects of medication may be indistinguishable from each other. We will consider all of your functional limitations, whether they result from your symptoms or signs of HIV infection or the side effects of your treatment.

b. *Structured treatment interruptions.* A structured treatment interruption (STI, also called a ''drug holiday'') is a treatment practice during which your treating source advises you to stop taking your medications temporarily. An STI in itself does not imply that your medical condition has improved; nor does it imply that you are noncompliant with your treatment because you are following your treating source's advice. Therefore, if you have stopped taking medication because your treating source prescribed or recommended an STI, we will not find that you are failing to follow treatment or draw inferences about the severity of your impairment on this fact alone. We will consider why your treating source has prescribed or recommended an STI and all the other information in your case record when we determine the severity of your impairment.

6. *When there is no record of ongoing treatment.* If you have not received ongoing treatment or have not had an ongoing relationship with the medical community despite the existence of a severe impairment(s), we will evaluate the medical severity and duration of your immune system disorder on the basis of the current objective medical evidence and other evidence in your case record, taking into consideration your medical history, symptoms, clinical and laboratory findings, and medical source opinions. If you have just begun treatment and we cannot determine whether you are disabled based on the evidence we have, we may need to wait to determine the effect of the treatment on your ability to develop and function in an age-appropriate manner. The amount of time we need to wait will depend on the facts of your case. If you have not received treatment, you may not be able to show an impairment that meets the criteria of one of the immune system disorders listings, but your immune system disorder may medically equal a listing or functionally equal the listings.

H. How do we consider your symptoms, including your pain, severe fatigue, and malaise?

Your symptoms, including pain, severe fatigue, and malaise, may be important factors in our determination whether your immune system disorder(s) meets or medically equals a listing or in our determination whether you otherwise have marked and severe functional limitations. In order for us to consider your symptoms, you must have medical signs or laboratory findings showing the existence of a medically determinable impairment(s) that could reasonably be expected to produce the symptoms. If you have such an impairment(s), we will evaluate the intensity, persistence, and functional effects of your symptoms using the rules throughout 114.00 and in our other regulations. See §§ 416.928,

and 416.929. Additionally, when we assess the credibility of your complaints about your symptoms and their functional effects, we will not draw any inferences from the fact that you do not receive treatment or that you are not following treatment without considering all of the relevant evidence in your case record, including any explanations you provide that may explain why you are not receiving or following treatment.

I. How do we use the functional criteria in these listings?

1. The following listings in this body system include standards for evaluating the functional limitations resulting from immune system disorders: 114.02B, for systemic lupus erythematosus; 114.03B, for systemic vasculitis; 114.04D, for systemic sclerosis (scleroderma); 114.05E, for polymyositis and dermatomyositis; 114.06B, for undifferentiated and mixed connective tissue disease; 114.07C, for immune deficiency disorders, excluding HIV infection; 114.08L, for HIV infection; 114.09D, for inflammatory arthritis; and 114.10B, for Sjögren's syndrome.

2. When we use one of the listings cited in 114.00I1, we will consider all relevant information in your case record to determine the full impact of your immune system disorder on your ability to function. Important factors we will consider when we evaluate your functioning under these listings include, but are not limited to: Your symptoms, the frequency and duration of manifestations of your immune system disorder, periods of exacerbation and remission, and the functional impact of your treatment, including the side effects of your medication.

3. To satisfy the functional criterion in a listing, your immune system disorder must result in an ''extreme'' limitation in one domain of functioning or a ''marked'' limitation in two domains of functioning depending on your age. (See 112.00C for additional discussion of these areas of functioning and §§ 416.924a and 416.926a for additional guidance on the evaluation of functioning in children.) Functional limitation may result from the impact of the disease process itself on your mental functioning, physical functioning, or both your mental and physical functioning. This could result from persistent or intermittent symptoms, such as depression, severe fatigue, or pain, resulting in a limitation of your ability to do a task, to concentrate, to persevere at a task, or to perform the task at an acceptable rate of speed. You may also have limitations because of your treatment and its side effects (see 114.00G).

J. How do we evaluate your immune system disorder when it does not meet one of these listings?

1. These listings are only examples of immune system disorders that we consider severe enough to result in marked and severe functional limitations. If your impairment(s) does not meet the criteria of any of these listings, we must also consider whether you have an impairment(s) that satisfies the criteria of a listing in another body system.

2. Individuals with immune system disorders, including HIV infection, may manifest signs or symptoms of a mental impairment or of another physical impairment. We may evaluate these impairments under any affected body system. For example, we will evaluate:

a. Growth impairment under 100.00.

b. Musculoskeletal involvement, such as surgical reconstruction of a joint, under 101.00.

c. Ocular involvement, such as dry eye, under 102.00.

d. Respiratory impairments, such as pleuritis, under 103.00.

e. Cardiovascular impairments, such as cardiomyopathy, under 104.00.

f. Digestive impairments, such as hepatitis (including hepatitis C) or weight loss as a result of HIV infection that affects the digestive system, under 105.00.

g. Genitourinary impairments, such as nephropathy, under 106.00.

h. Hematologic abnormalities, such as anemia, granulocytopenia, and thrombocytopenia, under 107.00.

i. Skin impairments, such as persistent fungal and other infectious skin eruptions, and photosensitivity, under 108.00.

j. Neurologic impairments, such as neuropathy or seizures, under 111.00.

k. Mental disorders, such as depression, anxiety, or cognitive deficits, under 112.00.

l. Allergic disorders, such as asthma or atopic dermatitis, under 103.00 or 108.00 or under the criteria in another affected body system.

m. Syphilis or neurosyphilis under the criteria for the affected body system, for example, 102.00 Special senses and speech, 104.00 Cardiovascular system, or 111.00 Neurological.

3. If you have a severe medically determinable impairment(s) that does not meet a listing, we will determine whether your impairment(s) medically equals a listing. (See § 416.926.) If it does not, we will also consider whether you have an impairment(s) that functionally equals the listings. (See § 416.926a.) We use the rules in § 416.994a when we decide whether you continue to be disabled.

114.01 *Category of Impairments, Immune System Disorders.*

114.02 *Systemic lupus erythematosus.* As described in 114.00D1. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity; and

2. At least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss).

or

B. Any other manifestation(s) of SLE resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A–E of 112.12; or

2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or

3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

114.03 *Systemic vasculitis.* As described in 114.00D2. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity; and

2. At least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss).

or

B. Any other manifestation(s) of systemic vasculitis resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A–E of 112.12; or

2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or

3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

114.04 *Systemic sclerosis (scleroderma).* As described in 114.00D3. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity; and

2. At least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss).

or

B. With one of the following:

1. Toe contractures or fixed deformity of one or both feet, resulting in the inability to ambulate effectively as defined in 114.00C6; or

2. Finger contractures or fixed deformity in both hands, resulting in the inability to perform fine and gross movements effectively as defined in 114.00C7; or

3. Atrophy with irreversible damage in one or both lower extremities, resulting in the inability to ambulate effectively as defined in 114.00C6; or

4. Atrophy with irreversible damage in both upper extremities, resulting in the inability to perform fine and gross movements effectively as defined in 114.00C7.

or

C. Raynaud's phenomenon, characterized by:

1. Gangrene involving at least two extremities; or

2. Ischemia with ulcerations of toes or fingers, resulting in the inability to ambulate effectively or to perform fine and gross movements effectively as defined in 114.00C6 and 114.00C7;

or

D. Any other manifestation(s) of systemic sclerosis (scleroderma) resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A–E of 112.12; or

2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or

3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

114.05 *Polymyositis and dermatomyositis.* As described in 114.00D4. With:

A. Proximal limb-girdle (pelvic or shoulder) muscle weakness, resulting in inability to ambulate effectively or inability to perform fine and gross movements effectively as defined in 114.00C6 and 114.00C7.

or

B. Impaired swallowing (dysphagia) with aspiration due to muscle weakness.

or

C. Impaired respiration due to intercostal and diaphragmatic muscle weakness.

or

D. Diffuse calcinosis with limitation of joint mobility or intestinal motility.

or

E. Any other manifestation(s) of polymyositis or dermatomyositis resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A–E of 112.12;

or

2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or

3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

114.06 *Undifferentiated and mixed connective tissue disease.* As described in 114.00D5. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity; and

2. At least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss).

or

B. Any other manifestation(s) of undifferentiated or mixed connective tissue disease resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A–E of 112.12; or

2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or

3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

114.07 *Immune deficiency disorders, excluding HIV infection.* As described in 114.00E. With:

A. One or more of the following infections. The infection(s) must either be resistant to treatment or require hospitalization or intravenous treatment three or more times in a 12-month period.

1. Sepsis; or

2. Meningitis; or

3. Pneumonia; or

4. Septic arthritis; or

5. Endocarditis; or

6. Sinusitis documented by appropriate medically acceptable imaging.

or

B. Stem cell transplantation as described under 114.00E3. Consider under a disability until at least 12 months from the date of transplantation. Thereafter, evaluate any residual impairment(s) under the criteria for the affected body system.

or

C. Any other manifestation(s) of an immune deficiency disorder resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A–E of 112.12; or

2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or

3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

114.08 *Human immunodeficiency virus (HIV) infection.* With documentation as described in 114.00F and one of the following:

A. Bacterial infections:

1. Mycobacterial infection (for example, caused by *M. avium-intracellulare*, *M. kansasii*, or *M. tuberculosis*) at a site other than the lungs, skin, or cervical or hilar lymph nodes, or pulmonary tuberculosis resistant to treatment; or

2. Nocardiosis; or

3. *Salmonella* bacteremia, recurrent non-typhoid; or

4. In a child less than 13 years of age, multiple or recurrent pyogenic bacterial infections (sepsis, pneumonia, meningitis, bone or joint infection, or abscess of an internal organ or body cavity, but not otitis media or superficial skin or mucosal abscesses) occurring two or more times in 2 years (for children age 13 and older, see 114.00F4c); or

5. Multiple or recurrent bacterial infections, including pelvic inflammatory disease, requiring hospitalization or intravenous antibiotic treatment three or more times in a 12-month period.

or

B. Fungal infections:

1. Aspergillosis; or

2. Candidiasis involving the esophagus, trachea, bronchi, or lungs, or at a site other than the skin, urinary tract, intestinal tract, or oral or vulvovaginal mucous membranes; or

3. Coccidioidomycosis, at a site other than the lungs or lymph nodes; or

4. Cryptococcosis, at a site other than the lungs (for example, cryptococcal meningitis); or

5. Histoplasmosis, at a site other than the lungs or lymph nodes; or

6. Mucormycosis; or

7. *Pneumocystis* pneumonia or extrapulmonary *Pneumocystis* infection.

or

C. Protozoan or helminthic infections:

1. Cryptosporidiosis, isosporiasis, or microsporidiosis, with diarrhea lasting for 1 month or longer; or

2. Strongyloidiasis, extra-intestinal; or

3. Toxoplasmosis of an organ other than the liver, spleen, or lymph nodes.

or

D. Viral infections:

1. *Cytomegalovirus* disease (documented as described in 114.00F3b(ii)) at a site other than the liver, spleen, or lymph nodes; or

2. Herpes simplex virus causing:

a. Mucocutaneous infection (for example, oral, genital, perianal) lasting for 1 month or longer; or

b. Infection at a site other than the skin or mucous membranes (for example, bronchitis, pneumonitis, esophagitis, or encephalitis); or

c. Disseminated infection; or

3. Herpes zoster:

a. Disseminated; or

b. With multidermatomal eruptions that are resistant to treatment; or

4. Progressive multifocal leukoencephalopathy.

or

E. Malignant neoplasms:

1. Carcinoma of the cervix, invasive, FIGO stage II and beyond; or

2. Kaposi's sarcoma with:

a. Extensive oral lesions; or

b. Involvement of the gastrointestinal tract, lungs, or other visceral organs; or

3. Lymphoma (for example, primary lymphoma of the brain, Burkitt's lymphoma, immunoblastic sarcoma, other non-Hodgkin's lymphoma, Hodgkin's disease); or

4. Squamous cell carcinoma of the anal canal or anal margin.

or

F. Conditions of the skin or mucous membranes (other than described in B2, D2, or D3, above), with extensive fungating or ulcerating lesions not responding to treatment (for example, dermatological conditions such as eczema or psoriasis, vulvovaginal or other mucosal *Candida,* condyloma caused by human *Papillomavirus,* genital ulcerative disease).

or

G. Neurological manifestations of HIV infection (for example, HIV encephalopathy, peripheral neuropathy) resulting in one of the following:

1. Loss of previously acquired, or marked delay in achieving, developmental milestones or intellectual ability (including the sudden onset of a new learning disability);

or

2. Impaired brain growth (acquired microcephaly or brain atrophy—see 114.00F4b); or

3. Progressive motor dysfunction affecting gait and station or fine and gross motor skills.

or

H. Growth disturbance, with:

1. An involuntary weight loss (or failure to gain weight at an appropriate rate for age) resulting in a fall of 15 percentiles from an established growth curve (on standard growth charts) that persists for 2 months or longer; or

2. An involuntary weight loss (or failure to gain weight at an appropriate rate for age) resulting in a fall to below the third percentile from an established growth curve (on standard growth charts) that persists for 2 months or longer; or

3. Involuntary weight loss of 10 percent or more of baseline (computed based on pounds, kilograms, or body mass index (BMI)) that persists for 2 months or longer.

or

I. Diarrhea, lasting for 1 month or longer, resistant to treatment and requiring intravenous hydration, intravenous alimentation, or tube feeding.

or

J. Lymphoid interstitial pneumonia/pulmonary lymphoid hyperplasia (LIP/PLH complex), with respiratory symptoms that significantly interfere with age-appropriate activities, and that cannot be controlled by prescribed treatment.

or

K. One or more of the following infections (other than described in A–J, above). The infection(s) must either be resistant to treatment or require hospitalization or intravenous treatment three or more times in a 12-month period.

1. Sepsis; or
2. Meningitis; or
3. Pneumonia; or
4. Septic arthritis; or
5. Endocarditis; or
6. Sinusitis documented by appropriate medically acceptable imaging.

or

L. Any other manifestation(s) of HIV infection, including those listed in 114.08A–K, but without the requisite findings for those listings (for example, oral candidiasis not meeting the criteria in 114.08F, diarrhea not meeting the criteria in 114.08I), or other manifestation(s) (for example, oral hairy leukoplakia, hepatomegaly), resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A–E of 112.12; or
2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or
3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

114.09 *Inflammatory arthritis.* As described in 114.00D6. With:

A. Persistent inflammation or persistent deformity of:

1. One or more major peripheral weight-bearing joints resulting in the inability to ambulate effectively (as defined in 114.00C6); or
2. One or more major peripheral joints in each upper extremity resulting in the inability to perform fine and gross movements effectively (as defined in 114.00C7).

or

B. Inflammation or deformity in one or more major peripheral joints with:

1. Involvement of two or more organs/body systems with one of the organs/body systems involved to at least a moderate level of severity; and
2. At least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss).

or

C. Ankylosing spondylitis or other spondyloarthropathies, with:

1. Ankylosis (fixation) of the dorsolumbar or cervical spine as shown by appropriate medically acceptable imaging and measured on physical examination at 45° or more of flexion from the vertical position (zero degrees); or
2. Ankylosis (fixation) of the dorsolumbar or cervical spine as shown by appropriate medically acceptable imaging and measured on physical examination at 30° or more of flexion (but less than 45°) measured from the vertical position (zero degrees), and involvement of two or more organs/body systems with one of the organs/body systems involved to at least a moderate level of severity.

or

D. Any other manifestation(s) of inflammatory arthritis resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A–E of 112.12; or
2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or
3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

114.10 *Sjögren's syndrome.* As described in 114.00D7. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity; and
2. At least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss).

OR

B. Any other manifestation(s) of Sjögren's syndrome resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A–E of 112.12; or
2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or
3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

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Part III

Securities and Exchange Commission

17 CFR Parts 239, 270, and 274
Exchange-Traded Funds; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 239, 270, and 274

[Release Nos. 33–8901; IC–28193; File No. S7–07–08]

RIN 3235–AJ60

Exchange-Traded Funds

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'' or ''SEC'') is proposing a new rule under the Investment Company Act of 1940 that would exempt exchange-traded funds (''ETFs'') from certain provisions of that Act and our rules. The rule would permit certain ETFs to begin operating without the expense and delay of obtaining an exemptive order from the Commission. The rule is designed to eliminate unnecessary regulatory burdens, and to facilitate greater competition and innovation among ETFs. The Commission also is proposing amendments to our disclosure form for open-end investment companies, Form N–1A, to provide more useful information to investors who purchase and sell ETF shares on national securities exchanges. In addition, the Commission is proposing a new rule to allow mutual funds (and other types of investment companies) to invest in ETFs to a greater extent than currently permitted under the Investment Company Act.

DATES: Comments should be received on or before May 19, 2008.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–07–08 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–07–08. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: With respect to proposed rule 6c–11 and amendments to Form N–1A, Dalia Osman Blass, Senior Counsel, or Penelope Saltzman, Acting Assistant Director, (202) 551–6792, with respect to proposed rule 12d1–4 and proposed amendments to rule 12d1–2, Adam Glazer, Senior Counsel, or Penelope Saltzman, Acting Assistant Director, (202) 551–6792, Office of Regulatory Policy, Division of Investment Management, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–5041.

SUPPLEMENTARY INFORMATION: The Commission is proposing for public comment new rules 6c–11 [17 CFR 270.6c–11] and 12d1–4 [17 CFR 270.12d1–4] and amendments to rule 12d1–2 [17 CFR 270.12d1–2] under the Investment Company Act of 1940 (''Investment Company Act'' or ''Act''),[1] and amendments to Form N–1A [2] under the Investment Company Act and the Securities Act of 1933 (the ''Securities Act'').[3]

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I. Introduction

Exchange-traded funds are an increasingly popular investment vehicle.[4] Last year, the number of ETFs

[1] 15 U.S.C. 80a. Unless otherwise noted, all references to rules under the Investment Company Act will be to Title 17, Part 270 of the Code of Federal Regulations [17 CFR 270], and all references to statutory sections are to the Investment Company Act.

[2] 17 CFR 239.15A, 17 CFR 274.11A.

[3] 15 U.S.C. 77a.

[4] When we refer to an ETF in this release, we refer to an ETF that meets the definition of ''investment company'' and is registered under the Investment Company Act generally because it issues securities and is primarily engaged or proposes to primarily engage in the business of investing in securities. Some other types of exchange-traded funds, which we will not discuss in this release, invest primarily in commodities or commodity-based instruments, such as crude oil and precious metal (''commodity ETFs''). Commodity ETFs are typically organized as trusts, and issue shares that trade on a securities exchange like other ETFs, but they are not ''investment companies'' under the Investment Company Act. *See* section 3(a)(1) (defining the term ''investment company'' as a company that ''(A) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities; (B) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or (C) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets

traded in U.S. markets increased by 67 percent, from 357 to 601, and the assets held by ETFs increased by about 42 percent, to approximately $580 billion.[5] Although aggregate ETF assets are less than seven percent of assets held by traditional mutual funds (*i.e.*, open-end investment companies),[6] they are growing more rapidly.[7]

ETFs offer public investors an undivided interest in a pool of securities and other assets and thus are similar in many ways to traditional mutual funds, except that shares in an ETF can be bought and sold throughout the day like stocks on an exchange through a broker-dealer.[8] ETFs therefore possess characteristics of traditional mutual funds, which issue redeemable shares, and of closed-end investment companies, which generally issue shares that trade at negotiated market prices on a national securities exchange and are not redeemable.[9]

Since they were first developed in the early 1990s, ETFs have evolved. The first ETFs held a basket of securities that replicated the component securities of broad-based stock market indexes, such as the S&P 500.[10] Many of the newer ETFs are based on more specialized indexes,[11] including indexes that are designed specifically for a particular ETF,[12] bond indexes,[13] and international indexes.[14] Originally marketed as opportunities for investors to participate in tradable portfolio or basket products, ETFs are held today in increasing amounts by institutional investors (including mutual funds) and other investors as part of sophisticated trading and hedging strategies.[15] Shares of ETFs can be bought and held (sometimes as a core component of a portfolio),[16] or they can be traded frequently as part of an active trading strategy.[17]

Like money market funds first offered in the 1970s, ETFs represent a new type of registered investment company (''fund''). And like money market funds, they have required exemptions from certain provisions of the Act before they can commence operations.[18] Since 1992, the Commission has issued 61 orders to ETFs and their sponsors.[19]

In this release, we propose a new rule that would codify the exemptive orders we have issued to ETFs. Proposed rule 6c–11 would allow new competitors (*i.e.*, those sponsors who do not already have exemptive orders) to enter the market more easily. We also are proposing amendments to our registration form for open-end funds, Form N–1A, to provide more useful information to individual investors who purchase and sell ETF shares on national securities exchanges. Finally, we are proposing a new rule to allow funds to invest in ETFs to a greater extent than currently permitted under the Act and our rules.

(exclusive of Government securities and cash items) on an unconsolidated basis.''). 15 U.S.C. 80a–3(a)(1).

[5] Investment Company Institute (''ICI''), Outline of Supplemental Tables for Exchange-Traded Fund Report (*http://members.ici.org/stats/etfdata.xls* (''ICI ETF Statistics 2007'')), *Exchange-Traded Fund Assets December 2007*, Jan. 30, 2008 (''*ICI ETF Assets 2007*''). ICI statistics cited in this release may be found at: *http://www.ici.org/stats/etf/index.html* and exclude commodity ETFs. By comparison, 153 ETFs were introduced in 2006, 50 were introduced in 2005, and 32 ETFs were introduced in 2004. ICI, *2007 Investment Company Fact Book*, May 2007.

[6] In 2007, net new investment in ETFs was approximately $142 billion compared to $212 billion in traditional mutual funds, or 67 percent of net new investment in traditional mutual funds. ICI ETF Statistics 2007, *supra* note 5; ICI, *Trends in Mutual Fund Investing December 2007*, Jan. 30, 2008 (''*ICI Trends December 2007*'').

[7] *ICI ETF Assets 2007*, *supra* note 5. As of December 2007, assets held by traditional equity and bond mutual funds were $8.9 trillion. *ICI Trends December 2007*, *supra* note 6. In 2007, ETF assets grew 42 percent (from $407.9 billion to $579.5 billion) while traditional equity and bond mutual fund assets grew 9.7 percent (from $8.06 trillion to $8.9 trillion). *See* ICI ETF Statistics 2007, *supra* note 5; *ICI Trends December 2007*, *supra* note 6.

[8] ETF shares represent an undivided interest in the portfolio of assets held by the fund. ETFs are registered with the Commission and are organized either as open-end investment companies or unit investment trusts (''UITs''). *See* section 5(a)(1) of the Investment Company Act (defining ''open-end company'' as a management company that is offering for sale or has outstanding any redeemable security of which it is the issuer); section 4(2) of the Act (defining ''unit investment trust'' as an investment company that (A) is organized under a trust indenture, contract of custodianship or agency, or similar instrument, (B) does not have a board of directors, and (C) issues only redeemable securities, each of which represents an undivided interest in a unit of specified securities, but does not include a voting trust). 15 U.S.C. 80a–5(a)(1).

[9] ETFs today have certain characteristics that have made them attractive to investors. Many have lower expense ratios and certain tax efficiencies compared to traditional mutual funds, and they allow investors to buy and sell shares at intra-day market prices. Moreover, investors can sell ETF shares short, write options on them, and set market, limit, and stop-loss orders on them. The shares of many ETFs often trade on the secondary market at prices close to the net asset value (''NAV'') of the shares, rather than at discounts or premiums.

[10] *See, e.g.*, SPDR Trust, Series 1, Investment Company Act Release Nos. 18959 (Sept. 17, 1992) [57 FR 43996 (Sept. 23, 1992)] (notice) and 19055 (Oct. 26, 1992) (order) (''SPDR Order''); Diamonds Trust, Investment Company Act Release Nos. 22927 (Dec. 5, 1997) [62 FR 65453 (Dec. 12, 1997)] (notice) and 22979 (Dec. 30, 1997) (order). The S&P 500 stands for the Standard & Poor's 500 Composite Stock Price Index.

[11] ETF providers offer ETFs that track the performance of indexes related to particular industries or market sectors. In 2007, domestic sector/industry ETFs increased by 62% from 135 to 219. *ICI ETF Assets 2007*, *supra* note 5.

[12] Many of these indexes are essentially portfolios of assets that are compiled (and change) on the basis of criteria that the index provider has designed for the particular ETF. Some indexes, for example, are ''fundamental'' indexes or rules-based indexes, in which the securities are chosen on criteria such as dividends and core earnings. *See, e.g.*, PowerShares Exchange-Traded Fund Trust, Investment Company Act Release Nos. 25961 (Mar. 4, 2003) [68 FR 11598 (Mar. 11, 2003)] (notice) (''PowerShares 2003 Notice'') and 25985 (Mar. 28, 2003) (order) (''PowerShares 2003 Order'') (PowerShares offers ETFs that mirror custom-built indexes based on ''Intellidexes,'' which were created by a quantitative unit of the American Stock Exchange). A few of the index providers that compile and revise the indexes are affiliated with the sponsor of the ETF. *See, e.g.*, WisdomTree Investments, Investment Company Act Release Nos. 27324 (May 18, 2006) [71 FR 29995 (May 24, 2006)] (notice) (''WisdomTree Notice'') and 27391 (June 12, 2006) (order) (''WisdomTree Order'') (WisdomTree's ETFs seek to track the price and yield performance of domestic and international equity securities indexes provided by an affiliate).

[13] As of December 2007, 49 ETFs track bond indexes. ICI, *Exchange-Traded Fund Assets December 2007*, Jan. 30, 2008. *See, e.g.*, Ameristock ETF Trust, Investment Company Act Release Nos. 27847 (May 30, 2007) [72 FR 31113 (June 5, 2007)] (notice) (''Ameristock Notice'') and 27874 (June 26, 2007) (order); Vanguard Bond Index Funds, Investment Company Act Release Nos. 27750 (Mar. 9, 2007) [72 FR 12227 (Mar. 15, 2007)] (notice) and 27773 (Apr. 2, 2007) (order); Barclays Global Fund Advisors, Investment Company Act Release Nos. 27608 (Dec. 21, 2006) [71 FR 78235 (Dec. 28, 2006)] (notice) (''Barclays High Yield Notice'') and 27661 (Jan. 17, 2007) (order).

[14] The first international equity ETFs were introduced in 1996. As of December 2007, there were 159 ETFs that provide exposure to international equity markets. ICI, *Exchange-Traded Fund Assets December 2007*, Jan. 30, 2008. International index-based ETFs increased by 87% from 85 in 2006 to 159 in 2007. *Id.*

[15] David Hoffman, *Funds' grip loosens as ETFs gain*, InvestmentNews, Apr. 28, 2006 (reporting that in 2004, 44% of 821 advisory firms polled by Financial Research Corp. of Boston said they collectively allocated an average of 12% of total assets under management to ETFs as compared with 2003, in which only 34% used ETFs and collectively allocated an average of 8% of assets under management).

[16] *See, e.g.*, iShares Trust, Investment Company Act Release No. 25969 (Mar. 21, 2003) [68 FR 15010 (Mar. 27, 2003)].

[17] *See* Gary L. Gastineau, Exchange-Traded Funds Manual, 2 (2002) (''Gastineau'') (ascribing the popularity of ETFs among active traders to high trading volume, competitive market makers, and active arbitrage pricing.). Morgan Stanley, *Exchange-Traded Funds Quarterly Report*, Nov. 16, 2006, at 13 (''They can be used by market timers wishing to gain or reduce exposure to entire markets or sectors throughout the trading day.'').

[18] *See* rule 2a–7 under the Act, which codified the standards for granting the applications filed by money market funds for exemptions from the pricing and valuation provisions of the Act. For a discussion of the administrative history of rule 2a–7, *see* Valuation of Debt Instruments and Computation of Current Price per Share by Certain Open-End Investment Companies (Money Market Funds), Investment Company Act Release No. 12206 (Feb. 1, 1982) [47 FR 5428 (Feb. 5, 1982)].

[19] Since 2000, the Commission has provided ETF sponsors relief for any ETFs created in the future in connection with their exemptive orders so that the sponsors can introduce new ETFs if the ETFs meet the terms and conditions contained in the exemptive orders. *See, e.g.*, Barclays Global Fund Advisors, Investment Company Act Release Nos. 24394 (Apr. 17, 2000) [65 FR 21219 (Apr. 20, 2000)] (notice) and 24451 (May 12, 2000) (order).

II. Operation of Exchange-Traded Funds

All ETFs trading today operate in a similar way.[20] Unlike traditional mutual funds, ETFs do not sell or redeem their individual shares (''ETF shares'') at net asset value (''NAV''). Instead, financial institutions purchase and redeem ETF shares directly from the ETF, but only in large blocks called ''creation units.'' [21] A financial institution that purchases a creation unit of ETF shares first deposits with the ETF a ''purchase basket'' of certain securities and other assets identified by the ETF that day, and then receives the creation unit in return for those assets. The basket generally reflects the contents of the ETF's portfolio and is equal in value to the aggregate NAV of the ETF shares in the creation unit. After purchasing a creation unit, the financial institution may hold the ETF shares, or sell some or all in secondary market transactions.[22]

Like operating companies and closed-end funds, ETFs register offerings and sales of ETF shares under the Securities Act and list their shares for trading under the Securities Exchange Act of 1934 (''Exchange Act'').[23] As with any listed security, investors may trade ETF shares at market prices. ETF shares purchased in secondary market transactions are not redeemable from the ETF except in creation units.

The redemption process is the reverse of the purchase process. The financial institution acquires (through purchases on national securities exchanges, principal transactions, or private transactions) the number of ETF shares that comprise a creation unit, and redeems the creation unit from the ETF in exchange for a ''redemption basket'' of securities and other assets.[24] An investor holding fewer ETF shares than the amount needed to constitute a creation unit (most retail investors) may dispose of those ETF shares by selling them on the secondary market. The investor receives market price for the ETF shares, which may be higher or lower than the NAV of the shares, and pays customary brokerage commissions on the sale.

The ability of financial institutions to purchase and redeem creation units at each day's NAV creates arbitrage opportunities that may help keep the market price of ETF shares near the NAV per share of the ETF. For example, if ETF shares begin trading on national securities exchanges at a price below the fund's NAV per share, financial institutions can purchase ETF shares in secondary market transactions and, after accumulating enough shares to comprise a creation unit, redeem them from the ETF in exchange for the more valuable securities in the ETF's redemption basket. Those purchases create greater market demand for the ETF shares, and thus tend to drive up the market price of the shares to a level closer to NAV.[25] Conversely, if the market price for ETF shares exceeds the NAV per share of the ETF itself, a financial institution can deposit a basket of securities in exchange for the more valuable creation unit of ETF shares, and then sell the individual shares in the market to realize its profit. These sales would increase the supply of ETF shares in the secondary market, and thus tend to drive down the price of the ETF shares to a level closer to the NAV of the ETF share.[26]

Arbitrage activity in ETF shares is facilitated by the transparency of the ETF's portfolio. Each day, the ETF publishes the identities of the securities in the purchase and redemption baskets, which are representative of the ETF's portfolio.[27] Each exchange on which the ETF shares are listed typically discloses an approximation of the current value of the basket on a per share basis (''Intraday Value'') [28] at 15 second intervals throughout the day and, for index-based ETFs, disseminates the current value of the relevant index.[29] This transparency can contribute to the efficiency of the arbitrage mechanism because it helps arbitrageurs determine whether to purchase or redeem creation units based on the relative values of ETF shares in the secondary market and the securities contained in the ETF's portfolio.

Arbitrage activity in ETF shares also appears to be affected by the liquidity of the securities in an ETF's portfolio. Most ETFs represent in their applications for exemptive relief that they invest in highly liquid securities.[30]

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[20] Until recently, all ETFs had an investment objective of seeking returns that are correlated to the returns of a securities index, and in this respect operated much like traditional index funds. Recently, we issued orders approving actively managed ETFs. *See* WisdomTree Trust, *et al.*, Investment Company Act Release Nos. 28147 (Feb. 6, 2008) [73 FR 7776 (Feb. 11, 2008)] (notice) (''WisdomTree Actively Managed ETF Notice'') and 28174 (Feb. 27, 2008) (order) (''WisdomTree Actively Managed ETF''); Barclays Global Fund Advisors, *et al.*, Investment Company Act Release Nos. 28146 (Feb. 6, 2008) [73 FR 7771 (Feb. 11, 2008)] (notice) and 28173 (Feb. 27, 2008) (order) (''Barclays Actively Managed ETF''); Bear Sterns Asset Management, Inc., *et al.*, Investment Company Act Release Nos. 28143 (Feb. 5, 2008) [73 FR 7768 (Feb. 11, 2008)] (notice) and 28172 (Feb. 27, 2008) (order) (''Bear Sterns Actively Managed ETF''); PowerShares Capital Management LLC, *et al.*, Investment Company Act Release Nos. 28140 (Feb. 1, 2008) [73 FR 7328 (Feb. 7, 2008)] (notice) (''PowerShares Actively Managed ETF Notice'') and 28171 (Feb. 27, 2008) (order) (''PowerShares Actively Managed ETF'' and collectively, ''Actively Managed ETF Orders'').

[21] As discussed further below, creation units typically consist of at least 25,000 ETF shares. *See infra* note 113.

[22] We note that depending on the facts and circumstances, broker-dealers that purchase a creation unit and sell the shares may be deemed to be participants in a distribution, which could render them statutory underwriters and subject them to the prospectus delivery and liability provisions of the Securities Act. *See* 15 U.S.C. 77b(a)(11).

[23] 15 U.S.C. 78a.

[24] ETFs sometimes provide cash-in-lieu payments on some (or all) purchases or redemptions. *See* infra notes 120–121 and accompanying text.

[25] The purchase of the ETF shares on the secondary market combined with the sale of the redemption basket securities also may create upward pressure on the price of ETF shares and/or downward pressure on the price of redemption basket securities, driving the market price and ETF NAV closer together.

[26] The institution's purchase of the purchase basket securities combined with the sale of ETF shares also may create downward pressure on the price of ETF shares and/or upward pressure on the price of purchase basket securities, driving the market price and the ETF's NAV closer together.

ETF sponsors and market participants report that the average deviation between the daily closing price and the daily NAV of ETFs that track domestic indexes is generally less than 2%. *See*, *e.g.*, Vanguard U.S. Stock ETFs, Prospectus 56–59 (Apr. 27, 2007). ETFs that track foreign indexes may have a more significant deviation. *See*, *e.g.*, iShares FTSE/Xinhua China 25 Index Fund, Prospectus 19 (Dec. 1, 2006).

[27] With respect to index-based ETFs, portfolio transparency is enhanced by the transparency of the underlying index. Index providers publicly announce the components of their indexes. Because an index-based ETF seeks to track the performance of an index, often by replicating the component securities of the index, the transparency of the underlying index results in a high degree of transparency in the ETF's investment operations. Similarly, each of the actively managed ETFs operating under the recent exemptive orders approved by the Commission is required to make public each day the securities and other assets in its portfolio. *See* Actively Managed ETF Orders, *supra* note 20.

[28] The Intraday Value also is referred to as the Intraday Indicative Value, Indicative Optimized Portfolio Value, Indicative Fund Value, Indicative Trust Value, or Indicative Partnership Value.

[29] National securities exchanges are permitted to disseminate this information at 60 second intervals for ETFs that track non-U.S. indexes. *See*, *e.g.*, Commentary .01(b)(2) to NYSE Acra Equities Rule 5.2(j)(3); Commentary 0.2(a)(C)(c) to American Stock Exchange Constitution and Rules & Arbitration Awards Rule 1000A.

[30] Index-based ETFs track indexes that have specified methodologies for selecting their component securities. The methodologies generally ensure that an index consists of securities that will be highly liquid. *See*, *e.g.*, Barclays High Yield Notice, *supra* note 13 (''The Underlying Index is a rules-based index designed to reflect the 50 most liquid U.S. dollar-denominated high-yield corporate bonds registered for sale in the U.S. or exempt from registration.''). Because index-based ETFs either replicate or sample the indexes, their portfolio securities also should possess these characteristics. The actively managed ETFs also appear to invest in highly liquid securities. *See* WisdomTree Actively Managed ETF, *supra* note 20 (investing in U.S. and foreign money market securities); Barclays Actively Managed ETF, *supra* note 20 (investing in foreign

Effective arbitrage depends in part on the ability of financial institutions to readily assemble the basket for purchases of creation units and to sell securities received upon redemption of creation units, and liquidity appears to be a factor in this process. An ETF's investment in less liquid securities may reduce arbitrage efficiency and thereby increase both the likelihood that a deviation between ETF share market price and NAV per share may occur and the amount of any deviation that does occur.

III. Exemptions Permitting Funds To Form and Operate as ETFs

Today we are proposing for public comment a new rule that would codify much of the relief and many of the conditions of orders that we have issued to index-based ETFs in the past, and more recently to certain actively managed ETFs. The proposed rule is designed to enable most ETFs to begin operations without the need to obtain individual exemptive relief from the Commission.

A. Scope of Proposed Rule 6c–11

1. Index-Based ETFs

Proposed rule 6c–11, like our orders, would provide exemptions for ETFs that have a stated investment objective of maintaining returns that correspond to the returns of a securities index whose provider discloses on its Internet Web site the identities and weightings [31] of the component securities and other assets of the index.[32] In this respect, the rule would codify our previous exemptive orders. Our experience is that the conditions included in the index-based ETF orders have effectively preserved the statutory purposes of the Act.

The proposed rule would not limit the types of indexes that an ETF may track or the types of securities that comprise any index. Thus, the rule would not limit the exemption to ETFs investing in liquid securities or assets, although existing ETFs generally have represented to us that their portfolios are comprised of highly liquid securities,[33] and, as open-end funds, are required to comply with the liquidity guidelines applicable to all open-end funds.[34]

We request comment regarding the effect of portfolio liquidity on the potential for deviation between ETF share market price and NAV and the amount of any deviation. In addition to the liquidity guidelines applicable to all open-end funds, should the Commission include additional liquidity requirements as a condition of the exemptions? If so, what additional requirements and why? Should the chance (or likelihood) that substantial discounts or premiums may occur if an ETF portfolio contains less liquid securities or assets be a regulatory concern for the Commission, or should it be treated as a material risk to be disclosed to prospective investors, permitting them to evaluate whether the risk makes the ETF an appropriate investment in light of the investor's investment objectives? [35] We note that currently there is substantially more market interest in ETFs that track broad-based indexes that are comprised of highly liquid securities than ETFs that track more specialized indexes.[36] How would liquidity or illiquidity of securities or other assets in an ETF's portfolio affect the ability of financial institutions to assemble securities for a purchase basket and thus the arbitrage mechanism and operation of the ETF? Would liquidity requirements preclude the development of specialty ETFs that serve narrow investment purposes but which may satisfy particular investment needs of certain investors?

2. Actively Managed ETFs

We recently issued exemptive orders to several actively managed ETFs and their sponsors.[37] Like our orders, proposed rule 6c–11 would provide an exemption for an actively managed ETF that discloses on its Internet Web site each business day the identities and weightings of the component securities and other assets held by the ETF.[38] Unlike index-based ETFs, an actively managed ETF does not seek to track the return of a particular index. Instead, an actively managed ETF's investment adviser, like an adviser to any traditional actively managed mutual fund, generally selects securities consistent with the ETF's investment objectives and policies without regard to a corresponding index.

In 2001, we sought comment on the concept of an actively managed ETF (''2001 Concept Release'').[39] We requested comment on a broad number of questions that we felt were important to consider before expanding the scope of the exemptive orders we had issued. We wanted to know how investors would use an actively managed ETF because it seemed that, unlike an investment in an index-based ETF, an investment in an actively managed ETF could not be used, for example, to implement a hedging strategy. We questioned whether an actively managed ETF would provide investors with the same or similar benefits as

money market securities); Bear Sterns Actively Managed ETF, *supra* note 20 (investing primarily in investment-grade fixed income securities); PowerShares Actively Managed ETF, *supra* note 20 (investing in large cap companies or U.S. government and corporate debt securities).

[31] Proposed rule 6c–11(e)(9) defines ''weighting of the component security'' as ''the percentage of the index's value represented, or accounted for, by such component security.''

[32] Proposed rule 6c–11(e)(4)(v)(B) (defining ''exchange-traded fund''); *see infra* Section III.B.1 for a discussion of this index transparency requirement. Index-based ETFs obtain returns that correspond to those of an underlying index by replicating or sampling the component securities of the index. An ETF that uses a replicating strategy generally invests in the component securities of the underlying index in the same approximate proportions as in the underlying index. *See*, *e.g.*, First Trust Exchange-Traded Fund, Investment Company Act Release No. 27051 (Aug. 26, 2005) [70 FR 52450 (Sept. 2, 2005)] (''First Trust Notice'') at n.1. If, however, there are practical difficulties or substantial costs involved in holding every security in the underlying index, the ETF may use a representative sampling strategy pursuant to which it will invest in some but not all of the relevant component securities. An ETF that uses a sampling strategy includes in its portfolio securities that are designed, in the aggregate, to reflect the underlying index's capitalization, industry, and fundamental investment characteristics, and to perform like the index. The ETF implements the sampling strategy by acquiring a subset of the component securities of the underlying index, and possibly some securities that are not included in the corresponding index that are designed to help the ETF track the performance of the index. *See*, *e.g., id.*

[33] *See supra* note 30 and accompanying and following text. *See* also WisdomTree Notice, *supra* note 12 at n.8 and accompanying text.

[34] Long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Statement Regarding ''Restricted Securities,'' Investment Company Act Release No. 5847 (Oct. 21, 1969) [35 FR 19989 (Dec. 31, 1970)]; Revisions of Guidelines to Form N–1A, Investment Company Act Release No. 18612 (Mar. 12, 1992) [57 FR 9828 (Mar. 20, 1992)]. A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the ETF. *See* Acquisition and Valuation of Certain Portfolio Instruments by Registered Investment Companies, Investment Company Act Release No. 14983 (Mar. 12, 1986) [51 FR 9773 (Mar. 21, 1986)] (adopting amendments to rule 2a–7 under the Act); Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities under Rules 144 and 145, Investment Company Act Release No. 17452 (Apr. 23, 1990) [55 FR 17933 (Apr. 30, 1990)] (adopting Rule 144A under the Securities Act).

[35] The Commission is proposing an amendment to Form N–1A that would codify the condition in our orders that ETFs disclose the extent and frequency with which market prices have tracked their NAV. *See infra* notes 169–170 and accompanying text.

[36] *See* ICI ETF Statistics 2007, *supra* note 5.

[37] *See* Actively Managed ETF Orders, *supra* note 20.

[38] Proposed rule 6c–11(e)(4)(v)(A); *see infra* Section III.B.1 for a discussion of this requirement.

[39] *See* Actively Managed Exchange-Traded Funds, Investment Company Act Release No. 25258 (Nov. 8, 2001) [66 FR 57614 (Nov. 15, 2001)] (''2001 Concept Release'').

index-based ETFs, including potential tax efficiencies and low expense ratios.

Our 2001 Concept Release also asked more focused questions about the structural and operational differences between the two types of ETFs and how those differences might affect the market value of ETF shares. We inquired whether as a matter of public policy an ETF must be designed to enable efficient arbitrage and thereby minimize the probability that ETF shares would trade at a material premium or discount.[40] We asked, for example, whether actively managed ETFs must have the same degree of portfolio transparency as index-based ETFs, a factor that appeared to contribute significantly to arbitrage efficiency.[41] It was unclear to us at that time whether an adviser to actively managed ETFs would be willing to provide the same degree of transparency as an adviser to index-based ETFs because, for example, disclosure could allow market participants to access the fund's investment strategy.[42] We were concerned that reduced transparency could expose arbitrageurs to greater investment risk and result in a less efficient arbitrage mechanism, which in turn could lead to more significant premiums and discounts than experienced by index-based ETFs.

We received 20 comments from market participants, many of which supported the introduction of actively managed ETFs.[43] Many commenters stated that actively managed ETFs would have the potential to provide investors with uses and benefits similar to index-based ETFs. For example, commenters maintained that, like index-based ETFs, actively managed ETFs could potentially serve as short-term or long-term investment vehicles, allow investors to gain exposure to an asset category such as value, growth or income, and play a significant role in an investor's hedging strategies.[44] Commenters also asserted that actively managed ETFs have the potential for providing investors benefits similar to index-based ETFs, including low expense ratios and intra-day exchange trading.[45] Other commenters, however, questioned whether some of the investor benefits traditionally associated with index-based ETFs would be present with actively managed ETFs.[46]

Commenters agreed that actively managed ETFs should be designed, like index-based ETFs, with an arbitrage mechanism intended to minimize the potential deviation between market price and NAV of ETF shares.[47] Not all commenters agreed, however, on whether we should be concerned with the extent of premiums or discounts and, therefore, whether we should require full portfolio transparency. Some asserted that the amount of any discount or premium that might develop ought not to be a consideration for us in determining whether to grant exemptive relief.[48] One commenter argued that ETFs with share prices that significantly deviate from NAV would likely not attract the interest of investors and would ultimately fail if they did not provide information necessary for market participants to make knowledgeable investment decisions.[49] Other commenters asserted that it is important to require that ETFs provide all investors with the same information about portfolio holdings[50] and to require clear fund disclosures regarding the risks associated with the level of transparency provided.[51] These commenters stressed the need, however, for sufficient market information to

[40] *Id.* at text following n.35.

[41] *See supra* note 27 and accompanying text.

[42] We also noted concerns that full disclosure could permit market participants to ''front-run'' portfolio trades. *See infra* text accompanying and preceding note 84. In addition, because actively managed portfolios likely would change more frequently and in less foreseeable ways than a portfolio of index-based ETFs, we were unclear how or whether an actively managed ETF would communicate intra-day portfolio changes to investors. *See generally,* Russ Wermers, *The Potential Effects of More Frequent Portfolio Disclosure on Mutual Fund Performance,* Investment Company Institute Perspective, June 2001, Vol. 7, No. 3, at *http://www.ici.org/perspective/per07-03.pdf.* (examining the potential effects of more frequent portfolio disclosure on the performance of mutual funds and concluding that, with more frequent disclosure, shareholders would likely receive lower total returns on their investments due to, among other things, front-running and free-riding).

[43] The comment letters to the 2001 Concept Release are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 (File No. S7–20–01), and are available on the Commission's Internet Web site: (*http://www.sec.gov/rules/concept/s72001.shtml.*)

[44] *See, e.g.*, Comment Letter of the American Stock Exchange LLC, File No. S7–20–01 (Mar. 5, 2002) (''For example, an investor may find that a particular actively managed ETF more closely tracks his securities holdings, and therefore may be a more effective hedge.''); Comment Letter of State Street Bank and Trust Company, File No. S7–20–01 (Jan. 14, 2002). One commenter asserted, however, that actively managed ETFs would be of greater interest to retail investors; institutional investors would not use active fund products for hedging, cash equitization or other strategies. Comment Letter of Barclays Global Investors, File No. S7–20–01 (Jan. 11, 2002).

[45] *See, e.g.*, Comment Letter of the American Stock Exchange LLC, File No. S7–20–01 (Mar. 5, 2002); Comment Letter of State Street Bank and Trust Company, File No. S7–20–01 (Jan. 14, 2002).

[46] One commenter, for example, asserted that an actively managed ETF would likely not experience similar tax efficiency because that is predominantly a function of the low portfolio turnover of index-based ETFs. The commenter also noted that actively managed ETFs are unlikely to have the low expenses associated with index-based ETFs, which result primarily from lower advisory fees associated with the passive management of those funds. Comment Letter of the Vanguard Group, File No. S7–20–01 (Feb. 14, 2002).

[47] *See, e.g.*, Comment Letter of the Vanguard Group, File No. S7–20–01 (Feb. 14, 2002); Comment Letter of Barclays Global Investors, File No. S7–20–01 (Jan. 11, 2002).

[48] *See, e.g.*, Comment Letter of the American Bar Association, Committee on Federal Regulation of Securities, File No. S7–20–01 (Feb. 1, 2002) (''We believe that the Commission should not mandate the level of transparency in ETFs' portfolios, but rather should allow fully informed demand in the financial markets to determine the proper levels. Different segments of the market with different needs might demand investment vehicles with different variation. To prevent market demand from determining the structure of investment vehicles would retard efficiency, competition, and capital formation.''); Comment Letter of State Street Bank and Trust Company, File No. S7–20–01 (Jan. 14, 2002) (''* * *[A] non-transparent actively managed ETF will be no worse off than closed-end funds trading today. In fact, the premium/discount of a non-transparent ETF should be narrower due to the ETF's open-ended qualities.''); Comment Letter of the Vanguard Group, File No. S7–20–01 (Feb. 14, 2002) (''While [spreads] may be higher for actively managed ETFs than for index ETFs, we do not believe that the discounts between market price and NAV will approach those seen in closed-end funds.'').

[49] *See* Comment Letter of State Street Bank and Trust Company, File No. S7–20–01 (Jan. 14, 2002); *see also* Comment Letter of the American Bar Association, Committee on Federal Regulation of Securities, File No. S7–20–01 (Feb. 1, 2002) (''Ultimately it is in the interest of the sponsor and investment adviser to provide for effective arbitrage opportunities. It is unlikely that an actively managed ETF sponsor would be able to convince the critical market participants such as specialists, market makers, arbitragers and other Authorized Participants to support a product that contained illiquid securities to a degree that would affect the liquidity of the ETF, making it difficult to price, trade and hedge, ultimately leading to its failure in the marketplace.'').

[50] *See, e.g.*, Comment Letter of the Vanguard Group, File No. S7–20–01 (Feb. 14, 2002) (''Sponsors of actively managed ETFs should not be permitted to provide more information about portfolio holdings to the exchange specialist and market makers than they provide to other investors. Vanguard believes, as a matter of fundamental fairness, that all investors in a fund must be treated equally. Providing information only to a favored few is inconsistent with the foundation of our capital markets—full and fair disclosure to all investors.'').

[51] *See, e.g.*, Comment Letter of Morgan Stanley & Co., File No. S7–20–01 (May 3, 2002) (''Even if the Commission were to determine that new forms of ETFs do pose a significant risk of trading at a discount or premium to NAV, we do not believe that the Commission should delay approval of the product for this reason. Instead, we would urge the Commission to address any perceived investor risks by requiring additional risk disclosure.''); Comment Letter of the Vanguard Group, File No. S7–20–01 (Feb. 14, 2002) (''Investors in an actively managed ETF must receive adequate disclosure about the risks associated with the level of the ETF's transparency (and other risks unique to actively managed ETFs) * * * if the ETF has limited transparency, the fund's disclosure documents should discuss the possibility that the spreads between bid and asked prices and between the market price and NAV of the fund's exchange-traded shares may be higher than is typically the case of index ETFs.'').

value the fund's portfolio.[52] Others argued that portfolio transparency is essential to support effective arbitrage.[53] One commenter asserted that any lack of transparency would negatively impact an ETF's arbitrage mechanism and would likely result in ETF shares trading at secondary market prices that do not reflect the value of the ETF's underlying portfolio.[54] The commenter noted that to the extent an ETF operates with less than full transparency during periods of market volatility, this would likely result in some individual investors buying or selling ETF shares at secondary market prices moving in the opposite direction of the ETF's NAV. The commenter urged us to consider carefully the consequence of granting an exemption that might yield such a result.[55] The Investment Company Institute asserted that to the extent that all or part of an ETF's portfolio is not transparent, it could raise significant investor protection concerns including the potential for disparate treatment of investors and the potential for the ETF to trade at significant premiums and discounts.[56]

Today we propose exemptions applicable to both index-based and actively managed ETFs that provide portfolio transparency to market participants. The comments we received, together with subsequent developments, address the principal concerns we raised in the 2001 Concept Release with respect to actively managed ETFs. We have received a number of applications from actively managed ETFs whose sponsors are interested in offering fully transparent, actively managed ETFs, and recently we have issued orders approving several of these ETFs.[57] As described in these applications, an actively managed ETF would operate in the same manner as an index-based ETF.[58] Each would be registered under the Act as an open-end fund and would redeem shares in creation units in exchange for basket assets. Each would be listed on a national securities exchange, and investors would trade the ETF shares throughout the day at market prices in the secondary market.[59] The national securities exchange typically would disseminate the Intraday Value of ETF shares at 15-second intervals throughout the trading day,[60] thereby providing institutional investors and other arbitrageurs the information necessary to engage in ETF share purchases and sales on the secondary market, and purchases and redemptions with the fund, which should help keep ETF share prices from trading at a significant discount or premium.[61] Finally, the actively managed ETFs represent that they would provide ETF investors with uses and benefits similar to index-based ETFs.[62]

We believe that permitting fully transparent, actively managed ETFs would provide additional investment choices for investors and that exemptions necessary to permit the operation of these ETFs would be in the public interest and consistent with the policies and purposes of the Act. By proposing this rule we are not, however, suggesting that we will not consider applications for exemptive orders for actively managed ETFs that do not satisfy the proposed rule's transparency requirements. Rather, we are at this time proposing to permit fully transparent, actively managed ETFs to be offered without first seeking individual exemptive orders from the Commission.

We request comment on allowing actively managed ETFs with fully transparent portfolios to rely on the exemptions provided by the proposed rule. We only recently approved orders to allow certain actively managed ETFs and have not had the opportunity to observe how they operate in the markets over a significant period of time. Should we wait until we have gained greater experience with the operation of actively managed ETFs before adopting a final rule applicable to them? Is there any concern that a fully transparent actively managed ETF would not facilitate an efficient arbitrage mechanism? Would actively managed ETFs provide investors with uses and benefits similar to or different than their index-based counterparts? Do these or any other concerns regarding the operation of a fully transparent actively managed ETF warrant limiting the rule to index-based ETFs and considering exemptions for actively managed ETFs on a case by case basis through the exemptive applications process? Should we consider exemptions for other types of actively managed ETFs? If so, how would the arbitrage mechanism work in these ETFs? What kinds of conditions should we consider in order to facilitate an arbitrage mechanism?

3. Organization as an Open-End Investment Company

Our proposed rule would be available only to ETFs that are organized as open-end funds.[63] We have provided similar exemptions to unit investment trusts (''UITs'') in the past.[64] However, because we have not received an exemptive application for a new ETF to be organized as a UIT since 2002, there does not appear to be a need to include UIT relief in the proposed rule.[65] We understand that ETF sponsors prefer the open-end fund structure because it allows more investment flexibility.[66] In

[52] *See, e.g.*, Comment Letter of the American Stock Exchange LLC, File No. S7–20–01 (Mar. 5, 2002) (asserting that non-transparent actively managed ETFs need not disclose the full contents of their portfolios ''so long as there is sufficient market information available to value the portfolio or a creation unit (or if different, the Redemption Basket) on an intra-day basis so as to facilitate secondary market trading and hedging.''); Comment Letter of State Street Bank and Trust Co., File No. S7–20–01 (''While the importance of an effective arbitrage mechanism is clear, there are potential ways to achieve an effective arbitrage mechanism with less than full transparency, and, potentially, with no portfolio transparency. This may be accomplished with proper disclosure of an actively managed ETF's investment strategy and portfolio characteristics.'').

[53] *See, e.g.*, Comment Letter of Barclays Global Investors, File No. S7–20–01 (Jan. 11, 2002) (''It is generally accepted that portfolio transparency is the key to effective arbitrage. Therefore, the most significant issue for the Commission * * * is whether [actively managed ETFs] would provide the necessary level and frequency of portfolio disclosure to support efficient arbitrage.'').

[54] *Id.*

[55] *Id.*

[56] Comment Letter of the Investment Company Institute, File No. S7–20–01 (Jan. 14, 2002).

[57] *See* Actively Managed ETF Orders, *supra* note 20.

[58] *See id.*

[59] *See infra* notes 88–94 and accompanying text for a discussion of the proposed rule's condition that ETF shares be approved for listing and trading on a national securities exchange.

[60] *See infra* notes 92–94 and accompanying text for a discussion of the proposed rule's condition that ETFs be listed on an exchange that disseminates the Intraday Value of ETF shares on a regular basis.

[61] *See supra* notes 27–29 and accompanying and following text. *See also* Actively Managed ETF Orders *supra* note 20.

[62] *See, e.g.*, In re PowerShares Capital Management LLC, *et al.*, Fifth Amendment, File No. 812–13386, filed Jan. 7, 2008 (''PowerShares Actively Managed ETF Application''), at 12–13 (available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549).

[63] Proposed rule 6c–11(e)(4).

[64] *See, e.g.*, SPDR Order, *supra* note 10. *See supra* note 8 for a definition of UITs.

[65] Although two exemptive applications for ETFs organized as UITs were filed in 2007, the applications were occasioned by the transfer of the sponsorship from Nasdaq Financial Products Services, Inc. to PowerShares Capital Management, LLC and did not result in new ETFs. See BLDRs Index Funds Trust, Investment Company Act Release No. 27745 (Feb. 28, 2007) [72 FR 9787 (Mar. 5, 2007)] (''BLDRs Notice''); Nasdaq-100 Trust, Series 1, Investment Company Act Release No. 27740 (Feb. 27, 2007) [72 FR 9594 (Mar. 2, 2007)].

[66] A UIT portfolio is fixed, and substitution of securities may take place only under certain circumstances. As a result, an ETF organized as a UIT typically replicates the holdings of the index it tracks. By contrast, existing ETFs organized as open-end funds may employ investment advisers and use a ''sampling'' strategy to track the index. Using a sampling strategy, an investment adviser can construct a portfolio that is a subset of the component securities in the corresponding index,

Continued

addition, unlike an ETF that is a UIT, an open-end fund ETF may participate in securities lending programs and has greater flexibility in reinvesting dividends received from portfolio securities. Of the 601 ETFs in existence as of December 2007, 593 were organized as open-end funds.[67]

We request comment on whether we should include ETFs organized as UITs in the definition of ETF under the proposed rule. If so, should they be subject to the same conditions set forth in the proposed rule?

B. Conditions

ETF sponsors have sought exemptions from certain provisions of the Act and our rules so that they may register ETFs as open-end funds. The principal distinguishing feature of open-end funds is that they offer for sale redeemable securities.[68] The Act defines ''redeemable security'' as any security that allows the holder to receive his or her proportionate share of the issuer's current net assets upon presentation to the issuer.[69]

Section 22(d) of the Act prohibits any dealer in redeemable securities from selling open-end fund shares at a price other than a current offering price described in the fund's prospectus.[70] Rule 22c–1 under the Act requires funds, their principal underwriters, and dealers to sell and redeem fund shares at a price based on the current NAV next computed after receipt of an order to buy or redeem.[71] Together, these provisions are designed to require that fund shareholders are treated equitably when buying and selling their fund shares.[72]

ETFs seeking to register as open-end funds under the Act require exemptions from these provisions because certain investors may purchase and sell individual ETF shares on the secondary market at current market prices, *i.e.*, at prices other than those described in the ETF's prospectus or based on NAV. As discussed above, investors (typically financial institutions) can purchase and redeem shares from the ETF at NAV only in creation units.[73] Because these financial institutions can take advantage of disparities between the market price of ETF shares and NAV, they may be in a different position than investors who buy and sell individual ETF shares only on the secondary market.[74] The disparities in market price and NAV, however, provide those institutional investors with opportunities for arbitrage that would tend to drive the market price in the direction of the ETF's NAV to the benefit of retail investors.[75]

Today, we propose a rule with certain conditions that may permit the ETF structure to operate within the scope of the Act without sacrificing appropriate investor protection, and is designed to be consistent with the purposes fairly intended by the policy and provisions of the Act.[76] Our orders have provided exemptions from the definition of ''redeemable security'' and section 22(d) and rule 22c–1 for ETFs with an arbitrage mechanism that helps maintain the equilibrium between market price and NAV. Our proposed rule would codify these exemptions subject to three conditions that appear to have facilitated the arbitrage mechanism: Transparency of the ETF's portfolio, disclosure of the ETF's Intraday Value, and listing on a national securities exchange.

1. Transparency of Index and Portfolio Holdings

To take advantage of the proposed exemption, an ETF must either (i) disclose on its Internet Web site each business day the identities and weightings of the component securities and other assets held by the fund, or (ii) have a stated investment objective of obtaining returns that correspond to the returns of a securities index, whose provider discloses on its Internet Web site the identities and weightings of the component securities and other assets of the index.[77] The Web page of the ETF or the index provider, as the case may be, must be publicly accessible at no charge.[78] Thus, the proposed rule would allow for an actively managed ETF provided that the actively managed ETF discloses its portfolio assets each business day.[79]

We seek comment on these transparency conditions. In particular, we request comment on the proposed provision requiring that an ETF that tracks an index and does not disclose its portfolio each business day must track an index whose provider discloses on an Internet Web site the component securities and other assets of the index it tracks.[80] Is it necessary for the rule to include this option instead of simply requiring daily portfolio disclosure by the ETF? What circumstances, if any, would prevent an index-based ETF from disclosing its portfolio holdings?[81] Would Internet Web site disclosure of portfolio holdings be sufficient? If not, what other means of disclosure should the ETF or the index provider use?

We also seek comment on whether we should require ETFs to disclose daily on their Internet Web sites liabilities (as well as portfolio holdings) to permit investors, particularly arbitrageurs, to evaluate the impact of leverage from borrowings on the fund's portfolio.[82]

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rather than a replication of the index. The investment adviser also may invest a specific portion of the ETF's portfolio in securities and other financial instruments that are not included in the corresponding index if the adviser believes the investment will help the ETF track its underlying index. *See, e.g.*, First Trust Notice, *supra* note 32, at. n.1.

[67] The number of ETFs organized as UITs is based on information in the Commission's database of Form N-SAR filings.

[68] 15 U.S.C. 80a–5(a)(1); *see infra* notes 109–121 and accompanying text.

[69] 15 U.S.C. 80a–2(a)(32).

[70] 15 U.S.C. 80a–22(d).

[71] 17 CFR 270.22c–1(a). The rule requires that funds calculate their NAV at least once daily Monday through Friday (with certain exceptions, including days on which no securities are tendered for redemption and the fund receives no orders to purchase or sell securities). *See* 17 CFR 270.22c–1(b)(1). Today, most funds calculate NAV as of the time the major U.S. stock exchanges close (typically at 4 p.m. Eastern Time). Thus, a fund's NAV generally reflects the closing prices of the securities it holds. Under rule 22c–1, an investor who submits an order before the 4:00 p.m. pricing time receives that day's price, and an investor who submits an order after the pricing time receives the next day's price.

[72] *See generally,* H.R. Rep. No. 2639, 76th Cong., 3d Sess., 8 (1940). *See also* Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, H.R. Doc. No. 279, 76th Cong., 1st Sess., pt. 3, at 860–874 (1939).

[73] *See supra* Section II for a discussion on the operation of ETFs.

[74] *See, e.g.,* Comment Letter of Barclays Global Investors, File No. S7–20–01 (Jan. 11, 2002) (''[D]uring periods of market volatility * * * it is not unreasonable to assume that some retail investors would buy or sell ETF shares at secondary market prices moving in the opposite direction of a fund's NAV.'').

[75] *See supra* notes 25–26 and accompanying text.

[76] Section 6(c) of the Act permits the Commission, conditionally or unconditionally, to exempt by rule any person, security, or transaction (or classes of persons, securities, or transactions) from any provision of the Act ''if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions'' of the Act. 15 U.S.C. 80a–6(c).

[77] Proposed rule 6c–11(e)(4)(v).

[78] *Id.*

[79] *See supra* discussion at Section III.A.2. An index-based ETF that has the investment objective of obtaining returns that correspond to the returns of multiple securities indexes may rely on the proposed rule provided that it discloses its portfolio in the same manner as a fully transparent actively managed ETF.

[80] The proposed rule defines an ''index provider'' to mean the person that determines the securities and other assets that comprise a securities index. *See* proposed rule 6c–11(e)(7).

[81] *See supra* note 27.

[82] For example, if an ETF enters into a written call to hedge the fair value exposure of an equity security in its portfolio, it would sacrifice any unrealized gains caused by the price of the equity security increasing above the price at which the call may be exercised (*i.e.* the strike price). Unless the

Should we limit such a requirement to certain kinds of ETFs that may have significant liabilities? If so, how should we identify the ETFs that would be subject to the condition?

One of the issues we discussed in the 2001 Concept Release was that full portfolio transparency could give market participants an ability to access the fund's market strategies (*i.e.,* ''free-riding'') and, in some cases, the ability to trade ahead of the ETF (*i.e.,* ''front-running'').[83] Those commenters who addressed the issue generally agreed that intra-day or advance portfolio disclosure may be detrimental to an actively managed ETF because it could enable third parties to front-run the fund.[84] Therefore, the proposed rule does not require disclosure of intra-day changes in the portfolio of the ETF, because currently, intra-day changes do not affect the composition of the ETF's basket assets until the next trading day.[85] The proposed rule also does not require advance disclosure of portfolio trades.[86]

We request comment on these aspects of the proposal. Should the rule require disclosure of portfolio changes more often than once a day? How would more frequent disclosure affect the arbitrage mechanism? Would more frequent disclosure increase the likelihood of free-riding or front-running? The rule does not limit ETFs to tracking specialized indexes that change their assets at or below a specified frequency. How might this affect the transparency of the portfolios of ETFs that would rely on index rather than portfolio disclosure?[87]

Should the proposed rule prohibit advance portfolio disclosure? Would advance portfolio disclosure increase the likelihood of free-riding or front-running? If so, should the risk that participants may engage in these activities be treated as a material risk to be disclosed to prospective investors permitting them to evaluate whether the risk makes the ETF an appropriate investment in light of the particular investor's investment objectives? How would advance disclosure affect the arbitrage mechanism? If the portfolio disclosed in advance differed from the actual portfolio acquired, would that affect the market's ability to price the ETF's shares?

2. Listing on a National Securities Exchange and Dissemination of Intraday Value

An ETF that relies on rule 6c–11 would need to satisfy two additional conditions set forth in the paragraph defining ''exchange-traded fund.''[88] First, shares issued by the ETF would have to be approved for listing and trading on a national securities exchange.[89] We have premised our previous exemptive orders on the ETF listing its shares for trading on a national securities exchange.[90] Listing on an exchange would provide an organized and continuous trading market for the ETF shares at negotiated prices. Applicants for exemptive relief have noted that this intra-day trading, combined with the arbitrage mechanism inherent in the ETF structure, should prevent significant premiums and discounts between the market price of ETF shares and the Intraday Value.[91]

Second, an ETF could rely on the rule only if a national securities exchange disseminates the Intraday Value at regular intervals during the trading day.[92] Applications for exemptive relief have noted that exchanges typically disseminate the Intraday Value every 15 seconds during trading hours.[93] They have also asserted that this regular dissemination of the Intraday Value enables market makers to engage in the arbitrage activities that determine the market price for ETF shares.[94]

We request comment on these two conditions. Should the rule require that ETF shares be listed on a national securities exchange? Should the rule make allowance for shares that are delisted for a short time, or for suspensions in listing? If an ETF's shares were not listed for trading on a national securities exchange (even on a temporary basis), would the ETF structure permit the arbitrage mechanism to function appropriately? Should the rule require an ETF to liquidate or take other steps in the event of delisting? Should the proposed rule condition relief on listing exchanges disseminating the Intraday Value? If not, are there other means for market makers to receive the Intraday Value? Are there alternatives to using the basket as the basis for the Intraday Value calculation? For example, should the rule require the entity calculating the Intraday Value to use the ETF's portfolio (as opposed to the basket)? Should the calculation method be prescribed?

The proposed rule does not require the dissemination of an ETF's Intraday Value at specific intervals because the rules of national securities exchanges, as approved by the Commission, establish the frequency of disclosure.[95] Should the rule specify a minimal frequency? For example, should the rule prohibit an ETF from relying on the exemption if it is listed on an exchange that permits dissemination at intervals longer than the current 15 or 60-second intervals?

3. Marketing

Our exemptive orders included a condition requiring each ETF to agree not to market or advertise the ETF as an open-end fund or mutual fund and to explain that ETF shares are not individually redeemable.[96] This condition was designed to help prevent retail investors from confusing ETFs with traditional mutual funds. Similarly, the proposed rule would require each ETF relying on the rule to identify itself in any sales literature as an ETF that does not sell or redeem individual shares, and explain that investors may purchase or sell individual ETF shares in secondary market transactions that do not involve

ETF discloses the presence of these and similar liabilities, investors may not be able to evaluate the impact of leverage on the NAV of the ETF.

[83] Market participants could trade ahead of an ETF if it disclosed portfolio assets in advance of the trades, rather than after the assets were acquired.

[84] *See, e.g.*, Comment Letter of the Vanguard Group, File No. S7–20–01 (Feb. 14, 2002); Comment Letter of the Investment Company Institute, File No. S7–20–01 (Jan. 14, 2002).

[85] Applicants seeking exemptions for actively managed ETFs noted that under accounting procedures followed by the funds, portfolio trades made on the prior business day (''T'') would be booked and reflected in the fund's NAV on the current business day (''T+1''). *See, e.g.,* WisdomTree Actively Managed ETF Notice, *supra* note 20, at n.5. As a result, these funds will not have to announce trades before they are made. In addition, the funds will be able to disclose at the beginning of each trading day the portfolio that will form the basis of the NAV calculation at the end of the day. *Id.*

[86] *See* proposed rule 6c–11(e)(4)(v)(A). Under the proposed rule, an ETF could disclose its portfolio at the end of the day on which relevant portfolio trades occurred (*i.e.,* after the portfolio assets are acquired) or the beginning of the following day, which would eliminate the potential for front-running.

[87] *See supra* note 77 and accompanying text.

[88] Proposed rule 6c–11(e)(4) (defining ''exchange-traded fund'').

[89] Proposed rule 6c–11(e)(4)(iii).

[90] *See, e.g.,* HealthShares, Inc., Investment Company Act Release No. 27553 (Nov. 16, 2006) [71 FR 67404, 67408 (Nov. 21, 2006)] (''HealthShares Notice'').

[91] *See, e.g.,* Amended and Restated Application of Ziegler Exchange Traded Trust, File No. 812–13224, filed Dec. 19, 2006 (''Ziegler Application''), at 10; PowerShares Actively Managed ETF Notice, *supra* note 20.

[92] Proposed rule 6c–11(e)(4)(i).

[93] *See, e.g.,* Van Eck, Van Eck Associates Corp., Investment Company Act Release No. 27283 (Apr. 7, 2006) [71 FR 19214 (Apr. 13, 2006)], at n.3; PowerShares Actively Managed ETF Notice, *supra* note 20, at n.2.

[94] *See, e.g.,* Ziegler Application, *supra* note 91, at 26–27.

[95] An ETF's Intraday Value is disseminated every 15 seconds (or 60 seconds in the case of ETFs that track foreign indexes). *See supra* note 29 and accompanying text.

[96] *See, e.g.*, WisdomTree Order, *supra* note 12.

the ETF.[97] This condition, like the prior condition in our orders, is designed to help prevent retail investors from confusing ETFs with traditional mutual funds.

We request comment on whether the proposed condition is likely to provide a benefit for investors with respect to ETF marketing and advertising materials. Are investors confused about the distinction between ETFs and traditional mutual funds? Should any confusion be addressed through rule requirements? Should the rule require ETFs to identify themselves as either index-based or actively managed ETFs?

4. Conflicts of Interest

Section 1(b)(2) of the Investment Company Act states that the public interest and the interest of investors are adversely affected when investment companies are organized, operated, managed, or their portfolio securities are selected, in the interest of directors, officers, investment advisers, or other affiliated persons, and underwriters, brokers, or dealers rather than in the interest of shareholders.[98] The operation of an ETF—specifically, the process in which a creation unit is purchased by delivering basket assets to the ETF, and redeemed in exchange for basket assets—may lend itself to certain conflicts for the ETF's investment adviser, which has discretion to specify the securities included in the baskets. For example, the adviser could direct creation unit purchasers to purchase securities from affiliates of the adviser for subsequent presentation to the ETF. As we noted in the 2001 Concept Release, these conflicts would appear to be minimized in the case of an index-based ETF because the universe of securities that may be included in the ETF's portfolio generally is restricted by the composition of its corresponding index.[99] We also noted that the same would not appear to be the case for an actively managed ETF. Because the adviser to an actively managed ETF would have greater discretion to designate securities to be included in the basket assets, a greater potential for conflicts appears to exist.

Commenters generally stated that actively managed ETFs would not be faced with conflicts that are different from those that currently exist for actively managed mutual funds.[100] One commenter, however, recommended that the Commission impose any prohibitions or conditions under the Act that would apply to transactions directly effected by the adviser on any transactions effected at the adviser's discretion.[101] The commenter noted that, for example, an ETF that is prohibited from acquiring a security in certain underwritings (under section 10(f) of the Act) [102] should be prohibited from circumventing this prohibition by including the security in the ETF's basket assets. Similarly, an adviser could attempt to circumvent section 17(a) restrictions on principal transactions between a registered fund and its affiliates by designating a security for the basket assets that a creation unit purchaser would have to purchase from an affiliate of the adviser.[103]

We have not included a condition in the proposed rule prohibiting an actively managed ETF's adviser, directly or indirectly, from causing a creation unit purchaser to acquire a security for the ETF through a transaction in which the ETF could not engage directly. An adviser to an actively managed ETF already is subject to section 48(a) of the Act, which prohibits a person from doing indirectly, through another person, what that person is prohibited by the Act from doing directly. An adviser, therefore, would be prohibited from causing an institution that transacts directly with the ETF (or any investor on whose behalf the institution may transact with the ETF) to acquire any security for the ETF through a transaction in which the ETF could not engage directly.[104]

We request comment on whether it would be useful to include a condition in the proposed rule reminding ETFs relying on the rule of the prohibitions contained in section 48(a) of the Act. We also request comment on potential conflicts of interest for an ETF's investment adviser. Does an adviser to a fully transparent, actively managed ETF face different conflicts of interest from the conflicts of an adviser to a traditional mutual fund? If so, what are those conflicts and how could the rule address them?

5. Affiliated Index Providers

Federal securities laws and the rules of national securities exchanges require funds and their advisers to adopt measures reasonably designed to prevent misuse of non-public information.[105] Funds are likely to be in a position to well understand the potential circumstances and relationships that could give rise to the misuse of non-public information, and can develop appropriate measures to address them. We believe these requirements should be sufficient to protect against the abuses addressed by the terms in the exemptive applications

[97] Proposed rule 6c–11(e)(4)(ii). The term sales literature is defined in the proposed rule to mean any advertisement, pamphlet, circular, form letter, or other sales material addressed to or intended for distribution to prospective investors other than a registration statement filed with the Commission under section 8 of the Act. Proposed rule 6c–11(e)(8). An ETF would have to make similar disclosures in its prospectus under the proposed amendments to Form N–1A. *See* proposed Item 6(h)(3) of Form N–1A, and *infra* text accompanying note 159.

[98] 15 U.S.C. 80a–1(b)(2).

[99] *See* 2001 Concept Release, *supra* note 39, at Section IV.E.2.

[100] *See, e.g.*, Comment Letter of the American Stock Exchange LLC, File No. S7–20–01 (Mar. 5, 2002); Comment Letter of State Street Bank and Trust Company, File No. S7–20–01 (Jan. 14, 2002); Comment Letter of Nuveen Investments, File No. S7–20–01 (Jan. 14, 2002).

[101] Comment Letter of the Investment Company Institute, File No. S7–20–01 (Jan. 14, 2002).

[102] Section 10(f) of the Act prohibits a fund from purchasing any security during an underwriting or selling syndicate if a principal underwriter of the security is an officer, director, member of an advisory board, investment adviser, or employee of the fund or if any of these persons is an affiliate of the principal underwriter. 15 U.S.C. 80a–10(f). This section protects fund shareholders by preventing an affiliated underwriter from placing or ''dumping'' unmarketable securities in the fund.

[103] Section 17(a) generally prohibits affiliated persons of a registered fund (''first-tier affiliates'') or affiliated persons of the fund's affiliated persons (''second-tier affiliates'') from selling securities or other property to the fund (or any company the fund controls). 15 U.S.C. 80a–17(a).

[104] *See Lessler* v. *Little,* 857 F.2d 866, 873–874 (1st Cir. 1988) (reversing dismissal of a claim that principals of a registered investment company and its adviser had violated sections 17(a)(2) and 48(a) of the Act by purchasing the fund's assets indirectly by arranging for sale of the fund to a third party in conjunction with an arrangement whereby the adviser obtained excessive interest in the transferred assets); *SEC* v. *Commonwealth Chemical Securities,* 410 F. Supp 1002, 1018 (S.D.N.Y. 1976) (finding violations of sections 17(a) and 48(a) of the Act by directors of a registered investment company who caused a third party to purchase shares in an offering underwritten by an affiliated broker-dealer and sold the shares to the registered investment company).

[105] *See* rule 38a–1 (requiring funds to adopt policies and procedures reasonably designed to prevent violation of federal securities laws); rule 17j–1 (requiring funds to adopt a code of ethics containing provisions designed to prevent certain fund personnel (''access persons'') from misusing information regarding fund transactions); Section 204A of the Investment Advisers Act of 1940 (''Advisers Act'') (15 U.S.C. 80b–204A) (requiring an adviser to adopt policies and procedures that are reasonably designed, taking into account the nature of its business, to prevent the misuse of material, non-public information by the adviser or any associated person, in violation of the Advisers Act or the Exchange Act, or the rules or regulations thereunder); Section 15(f) of the Exchange Act (15 U.S.C. 78o(f)) (requiring a registered broker or dealer to adopt policies and procedures reasonably designed, taking into account the nature of the broker's or dealer's business, to prevent the misuse of material, nonpublic information by the broker or dealer or any person associated with the broker or dealer, in violation of the Exchange Act or the rules or regulations thereunder).

See, e.g. Rule Commentary .02(b)(i) of American Stock Exchange Rule 1000A (requiring ''firewalls'' between an ETF and an affiliated index provider).

of ETF sponsors that represented they would use an affiliated index provider. The proposed rule, therefore, does not include terms from previous applications that are designed to prevent the communication of material non-public information between the ETF and the affiliated index provider.[106]

We request comment on our proposal to eliminate these terms. Should the rule include any of the terms included in previous exemptive applications for affiliated index providers? If so, which terms and why?

C. Exemptive Relief

The unique structure of ETFs has required ETF sponsors to seek relief from certain provisions of the Act and our rules in order to form and operate. Proposed Rule 6c–11 would permit an ETF that meets the conditions of the rule to redeem shares in creation unit aggregations, to trade at current market prices, to engage in in-kind transactions with certain affiliates and, in certain circumstances, to pay the proceeds from the redemption of shares in more than seven days. The proposed exemptions would be subject to certain conditions that are designed to address the concerns underlying the statute and thereby satisfy the requirement that exemptions from statutory provisions are in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy of the Act.[107]

1. Issuance of ''Redeemable Securities''

Our exemptive orders have provided ETFs with relief from sections 2(a)(32) and 5(a)(1)[108] of the Act so that they may register under the Act as open-end funds while issuing shares that are redeemable in creation units only.[109] In support of the relief, ETF sponsors have noted that because the market price of ETF shares is disciplined by arbitrage opportunities, investors in ETF shares generally should be able to sell the shares in secondary market transactions at approximately their NAV.[110]

Proposed rule 6c–11 would deem an equity security issued by an ETF to be a ''redeemable security'' for purposes of section 2(a)(32) of the Act.[111] This provision would permit an ETF to register with the Commission as an open-end fund, which the Act defines as an investment company that issues redeemable securities,[112] even though ETF shares are issued and redeemed in creation unit aggregations.[113] This approach would provide ETFs with the same relief contained in our exemptive orders without exempting ETFs from other requirements imposed under the Act and our rules that apply to funds that issue redeemable securities.[114]

We request comment on this aspect of the proposed rule. Are there differences in ETFs and other funds that would justify not applying any provision of the Act or our rules that applies to funds that issue redeemable securities?

As discussed above, ETFs today operate with an arbitrage mechanism designed to minimize the potential deviation between the market price and NAV of ETF shares. The proposed rule would require that an ETF establish creation unit sizes the number of shares of which are reasonably designed to facilitate arbitrage, which is described in the proposed definition of creation unit as the purchase (or redemption) of shares from the ETF with an offsetting sale (or purchase) of shares on a national securities exchange at as nearly the same time as practicable for the purpose of taking advantage of a difference in the Intraday Value and the current market price of the shares.[115] The proposed rule also would require an ETF to disclose in its prospectus and any sales literature the number of ETF shares for which it will issue or redeem a creation unit to alert investors that they cannot purchase or redeem individual ETF shares directly from or with the ETF.[116]

The proposed condition regarding creation unit size is intended to require ETFs that rely on the proposed rule to choose creation unit sizes that promote an arbitrage mechanism and to preclude ETFs from setting very low or high thresholds, such as one ETF share per creation unit or one million ETF shares per creation unit. A low creation unit size could, as a practical matter, make the use of creation unit redemption irrelevant. The ETF would, in effect, be issuing and redeeming ETF shares like a traditional mutual fund, but the shares would trade on an exchange. Conversely, a high creation unit size could reduce the willingness or ability of institutional arbitrageurs to engage in creation unit purchases or redemptions. Impeding the ability of arbitrageurs to purchase and redeem ETF shares could disrupt the arbitrage pricing discipline, which could lead to more frequent occurrences of pricing premiums or discounts.

We request comment on the proposed requirement for creation unit size, which is included in the proposed rule's definition of ''creation unit.'' Does the requirement that an ETF establish creation unit sizes the number of which is reasonably designed to facilitate arbitrage provide the sponsor or adviser of the ETF with sufficient guidance in setting appropriate thresholds? Should we include other elements in our description of arbitrage, which is included in the definition of creation

[106] The terms are intended to address the potential conflicts of interest between the ETF adviser and its affiliated index provider, and include: (i) All of the rules that govern inclusion and weighting of securities in each index are made publicly available; (ii) the ability to change the rules for index compilation is limited and public notice is given before any changes are made; (iii) ''firewalls'' exist between (A) the staff responsible for the creation, development and modification of the index compilation rules and (B) the portfolio management staff; (iv) the calculation agent, who is responsible for all index maintenance, calculation, dissemination, and reconstitution activities, is not affiliated with the index provider, the ETF or any of their affiliates; and (v) the component securities of the index may not be changed more frequently than on a specified periodic basis. *See* HealthShares Notice, *supra* note 90; WisdomTree Notice, *supra* note 12.

[107] *See* 15 U.S.C. 80a–6(c).

[108] 15 U.S.C. 80a–2(a)(32) (defining ''redeemable security'' as any security the terms of which permit the holder upon presentation to receive the holder's proportionate share of the issuer's current net assets, or the cash equivalent); 15 U.S.C. 80a–5(a)(1).

[109] These exemptions are granted under section 6(c) of the Act. *See supra* note 76.

[110] *See, e.g.*, Ziegler Exchange Traded Trust, Investment Company Act Release No. 27610 (Dec. 22, 2006) [72 FR 163 (Jan. 3, 2007)] (''Ziegler Notice''); PowerShares Actively Managed ETF Notice, *supra* note 20, at text following n.5.

[111] Proposed rule 6c–11(a). Our orders provided an exemption from sections 2(a)(32) and 5(a)(1) to allow ETFs to redeem securities in creation unit aggregations rather than individually.

[112] *See* 15 U.S.C. 80a–5(a)(1).

[113] ETF creation units have ranged from 25,000 to 200,000 ETF shares. *See, e.g.*, PowerShares Actively Managed ETF Notice, *supra* note 20 (creation units are blocks of 50,000 to 100,000 ETF shares); ProShares Trust, Investment Company Act Release No. 27323 (May 18, 2006) [71 FR 29991 (May 24, 2006)] (notice) (''ProShares Notice'') (creation units are blocks of 25,000 to 50,000 ETF shares); WisdomTree Notice, *supra* note 12 (creation units are blocks of 25,000 to 200,000 ETF shares).

[114] *See, e.g.*, 15 U.S.C. 80a–22; 17 CFR 270.22c–1. In addition, the rules under the Exchange Act that apply to redeemable securities issued by a mutual fund would apply to ETFs. *See, e.g.*, 17 CFR 240.15c3–1.

[115] Proposed rule 6c–11(e)(3). We note that the Board of Governors of the Federal Reserve defines ''arbitrage'' in a similar manner in section 220.6(b) of Regulation T (''Arbitrage. A creditor may effect and finance for any customer bona fide arbitrage transactions. For the purpose of this section, the term ''bona fide arbitrage'' means: (1) A purchase or sale of a security in one market together with an offsetting sale or purchase of the same security in a different market at as nearly the same time as practicable for the purpose of taking advantage of a difference in prices in the two markets; or (2) A purchase of a security which is, without restriction other than the payment of money, exchangeable or convertible within 90 calendar days of the purchase into a second security together with an offsetting sale of the second security at or about the same time, for the purpose of taking advantage of a concurrent disparity in the prices of the two securities.''). 12 CFR 220.6.

[116] Proposed rule 6c–11(e)(4)(ii); Proposed Item 6(h)(3) to Form N–1A.

unit? If so, what elements? Should the proposed rule instead require the board of directors of the ETF to make a finding that the ETF is structured in a manner reasonably intended to facilitate arbitrage? This finding could require the board, for example, to look at the number of shares in each creation unit and the liquidity of the portfolio securities and other assets. What other elements, if any, should the board be required to review in making this finding?

The proposed rule does not include numerical thresholds for the number of ETF shares in each creation unit. Should the proposed rule include minimum or maximum numerical thresholds? If so, what would be appropriate thresholds and why? For example, should the rule set a minimum of 100 ETF shares, and/or a maximum of 500,000 ETF shares, per creation unit? Are our concerns with respect to smaller-or larger-sized creation units addressed by requiring ETFs to establish creation unit sizes that facilitate arbitrage? If the rule does not include any thresholds, would any of the exemptions provided by the proposed rule be inappropriate for an ETF with smaller-or larger-sized creation units? If so, which exemptions?

ETF applicants represent that ETF share prices are disciplined by arbitrage opportunities created by the ability to purchase and redeem creation units at NAV on a daily basis.[117] Would this pricing mechanism function differently for smaller-or larger-sized creation units? Because ETFs charge transaction fees for direct purchases and redemptions from the fund, ETF applicants have asserted that the interests of long-term shareholders should not be diluted by frequent traders, if those transaction fees accurately reflect the costs to the fund.[118] Are smaller-sized creation units likely to cause the transaction fees charged by ETFs to be insufficient to protect the long-term shareholders in the event of more frequent purchases and redemptions? If so, should an ETF relying on the proposed exemption be required to take additional measures designed to protect long-term shareholder interests from being diluted by frequent traders? If so, what measures?

As discussed above, ETFs issue and redeem shares in creation unit aggregations in exchange for the deposit or delivery of a basket of securities and other assets. The proposed rule defines ''basket assets'' to mean the securities or other assets specified each business day in name and number by the ETF as the securities or assets in exchange for which it will issue, or in return for which it will redeem, ETF shares.[119] The rule does not require that the basket mirror the portfolio of the ETF because in some circumstances it may not be practicable, convenient or operationally possible for the ETF to operate on an in-kind basis.[120] The rule, like our orders, allows an ETF to require or permit a purchasing or redeeming shareholder to substitute cash for some or all of the securities in the basket assets.[121]

We request comment on the proposed definition of basket assets. Are there any reasons why an ETF should not be permitted to substitute cash for some or all of the assets in the basket? Should the proposed rule include any conditions for when an ETF may require or permit cash substitutions? If so, what conditions should be included? Should the rule specify how the ETF would announce the composition of the basket? For example, should the rule mandate that the ETF post the information on its Internet Web site? Should the rule specify the frequency with which the ETF must announce the composition of the basket? If so, how often?

2. Trading of ETF Shares at Negotiated Prices

As noted above, section 22(d), among other things, prohibits a dealer from selling a redeemable security that is being offered currently to the public by or through an underwriter, except at a current public offering price described in the prospectus.[122] Rule 22c–1 generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a price based on its NAV.[123] Because secondary market trading in ETF shares takes place at current market prices, and not at the current offering price described in the prospectus or based on NAV, ETFs have obtained exemptions from section 22(d) and rule 22c–1.

The provisions of section 22(d), as well as rule 22c–1, are designed to prevent dilution caused by certain riskless trading schemes by principal underwriters and dealers, and to prevent unjust discrimination or preferential treatment among investors purchasing and redeeming fund shares.[124] The proposed rule would exempt a dealer in ETF shares from section 22(d) of the Act and rule 22c–1(a) with regard to purchases, sales and repurchases of ETF shares in secondary market transactions at current market prices.[125] As discussed above, we have provided exemptions from section 22(d) and rule 22c–1 in our orders because the arbitrage function appears to address the potential concerns regarding shareholder dilution and unjust discrimination that these provisions

[117] *See, e.g.*, Zeigler Application, *supra* note 91, at 52–53; *see also supra* notes 25–26 and accompanying and preceding text.

[118] *See* Zeigler Application, *supra* note 91, at 23; PowerShares Actively Managed ETF Application, *supra* note 62, at 17–18.

[119] Proposed rule 6c–11(e)(1). Under the proposed rule, the term ''business day'' with respect to an ETF would mean any day that the fund is open for business, including any day on which it is required to make payment under section 22(e) of the Act. Section 22(e) of the Act prohibits registered funds from suspending the right of redemption or postponing the date of payment upon redemption of any redeemable security for more than seven days except for certain periods specified in the provision. *See* 15 U.S.C. 80a–22(e). Proposed rule 6c–11(e)(2).

[120] The ETF and its adviser may decide to permit cash-only purchases of creation units to minimize transaction costs or enhance the ETF's operational efficiency. For example, on a day when a substantial rebalancing of an index-based ETF's portfolio is required, the adviser might prefer to receive cash rather than in-kind securities so that it has the liquid resources at hand to make the necessary purchases. If the ETF received in-kind securities on that day, it might have to sell some securities and acquire new ones to properly track its underlying index, incurring transaction costs that could have been avoided if the ETF had received cash instead. *See, e.g.*, Ziegler Application, *supra* note 91, at 21–22. For some ETFs that track country-specific equity securities indexes, it is operationally necessary to engage in cash-only transactions because of local law restrictions on transferability of securities. *See* iShares, Inc., Investment Company Act Release Nos. 25595 (May 29, 2002) [67 FR 38684 (June 5, 2002)] (notice) and 25623 (June 25, 2002) (order) (certain iShares ETFs that invest in certain foreign markets currently effect purchases and redemptions through cash transactions).

[121] Proposed rule 6c–11(e)(1). Though the standard operations of most existing ETFs involve in-kind purchases and redemptions, the Commission has consistently permitted the substitution of cash for certain securities in the basket assets. *See, e.g.*, WisdomTree Notice, *supra* note 12 at text preceding n.9. In addition, the Commission has permitted ETFs that primarily hold financial instruments, cash and cash equivalents in their portfolios to operate on a cash-only basis because of the limited transferability of financial instruments. *See, e.g.*, ProShares Notice, *supra* note 113, at n.2 and accompanying text. *See also* SPDR Lehman Municipal Bond ETF, Prospectus 19–22 (Sept. 10, 2007) (ETF generally sells creation units for cash only and redeems creation units in-kind only).

[122] 15 U.S.C. 80a–22(d).

[123] 17 CFR 270.22c–1.

[124] For a complete legislative history of section 22(d), *see* Exemption from Section 22(d) to Permit the Sale of Redeemable Securities at Prices that Reflect Different Sales Loads, Investment Company Act Release No. 13183 (Apr. 22, 1983) [44 FR 19887 (May 10, 1983)]. *See also* Adoption of Rule 22c–1 under the Investment Company Act of 1940 Prescribing the Time of Pricing Redeemable Securities for Distribution, Redemption, and Repurchase and Amendment of Rule 17a–3(a)(7) under the Securities Exchange Act of 1934 Requiring Dealers to Time Stamp Orders, Investment Company Act Release No. 5519 (Oct. 16, 1968) [33 FR 16331 (Nov. 7, 1968)].

[125] Proposed rule 6c–11(b).

were designed to address.[126] In addition, secondary market trading should not cause dilution for ETF shareholders because those transactions do not directly involve ETF portfolio assets (the transactions are with other investors, not the ETF), and thus have no direct impact on the NAV of ETF shares held by other investors. Moreover, to the extent that different prices for ETF shares exist during a given trading day, or from day to day, these variations occur as a result of third-party market forces, such as supply and demand, and not as a result of discrimination or preferential treatment among purchasers.

We request comment on this proposed relief. Should the relief also apply to parties other than dealers in ETF shares? If so, which other parties require similar relief, and why? Do dealers (or others) need relief from other provisions to facilitate transactions in ETF shares on the secondary market?

3. In-Kind Transactions Between ETFs and Certain Affiliates

Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such person, from selling any security to or purchasing any security from the company.[127] Purchases and redemptions of ETF creation units are typically in-kind rather than cash transactions,[128] and section 17(a) prohibits these in-kind purchases and redemptions by persons who are affiliated with the ETF, including those affiliated because they own 5 percent or more, and in some cases more than 25 percent, of the ETF's outstanding securities (''first-tier affiliates''), and by persons who are affiliated with the first-tier affiliates or who own 5 percent or more, and in some cases more than 25 percent, of the outstanding securities of one or more funds advised by the ETF's investment adviser (''second-tier affiliates'').[129]

We have granted exemptions from sections 17(a)(1) and (a)(2)[130] of the Act to allow these first- and second-tier affiliates of the ETF to purchase and redeem creation units through in-kind transactions.[131] In seeking this relief, applicants have submitted that because the first- and second-tier affiliates are not treated differently from non-affiliates when engaging in purchases and redemptions of creation units, there is no opportunity for these affiliated persons to effect a transaction detrimental to the other ETF shareholders. The securities to be deposited for purchases of creation units and to be delivered for redemptions of creation units are announced at the beginning of each day. All purchases and redemptions of creation units are at an ETF's next-calculated NAV (pursuant to rule 22c–1), and the securities deposited or delivered upon redemption are valued in the same manner, using the same standards, as those securities are valued for purposes of calculating the ETF's NAV.

The proposed rule would permit first- and second-tier affiliates of the ETF to purchase and redeem creation units through in-kind transactions.[132] The proposed exemption would not, however, apply to a specific category of redemptions that would be addressed in new rule 12d1–4, which we also are proposing today. Section 12(d)(1) of the Act imposes substantial limitations on the ability of investment companies to invest in other investment companies.[133] As discussed in Section IV of this release, proposed rule 12d1–4 would permit investment companies to acquire shares of ETFs in excess of the limitations on those investments under section 12(d)(1) of the Act subject to certain conditions intended to address the concerns underlying those limitations. One of the proposed conditions would prohibit investment companies from redeeming certain ETF shares acquired in reliance on proposed rule 12d1–4.[134] In order to make proposed rule 6c–11 consistent with the conditions in proposed rule 12d1–4, we propose to exclude investment companies that acquire ETF shares in reliance on proposed rule 12d1–4 from relying on proposed rule 6c–11(d) to redeem those ETF shares in kind.[135]

We request comment on this proposed exemption. Does the proposed exemption raise any risks with regard to affiliated transactions with the ETF? If so, should the exemption include any conditions to minimize those risks? Should the relief extend to parties that are affiliated persons of an ETF for other reasons? For example, should a broker-dealer that is affiliated with the ETF's adviser be allowed to transact in-kind with the ETF?

4. Additional Time for Delivering Redemption Proceeds

Section 22(e) of the Act generally prohibits a registered open-end investment company from suspending the right of redemption, or postponing the date of satisfaction of redemption requests more than seven days after the tender of a security for redemption.[136] Some ETFs that track foreign indexes have stated that local market delivery cycles for transferring foreign securities to redeeming investors, together with local market holiday schedules, require a delivery process in excess of seven days. These ETFs have requested, and we have granted, relief from section 22(e) so that they may satisfy redemptions up to a specified maximum number of calendar days depending upon specific circumstances in the local markets, as disclosed in the ETF's prospectus or statement of additional information (''SAI''). Other than in the disclosed situations, these ETFs satisfy redemptions within seven days.[137]

Section 22(e) of the Act is designed to prevent unreasonable delays in the satisfaction of redemptions, and ETF sponsors have asserted that the requested relief will not lead to the problems that section 22(e) was

[126] *See supra* notes 71–7573 and accompanying text.

[127] 15 U.S.C. 80a–17(a).

[128] ETFs must comply with the federal securities laws in accepting and satisfying redemptions with basket assets, including the registration provisions of the Securities Act. *See, e.g.*, Ameristock Notice, *supra* note 13, at n.3.

[129] An affiliated person of a fund includes, among others: (i) Any person directly or indirectly owning, controlling, or holding with power to vote, five percent or more of the outstanding voting securities of the fund; (ii) any person five percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the fund; and (iii) any person directly or indirectly controlling, controlled by, or under common control with such other person. 15 U.S.C. 80a–2(a)(3)(A), (B) and (C). A control relationship will be presumed where one person owns more than 25 percent of another person's outstanding voting securities. 15 U.S.C. 80a–2(a)(9).

[130] 15 U.S.C. 80a–17(a)(1), 80a–17(a)(2).

[131] *See, e.g.*, HealthShares Notice, *supra* note 90, at text following n.10.

[132] Proposed rule 6c–11(d).

[133] *See infra* note 194 and accompanying text.

[134] As discussed in Section IV.B.2, *infra,* this condition is designed to prevent a fund that relies on the proposed rule to acquire ETF shares in excess of the limits of section 12(d)(1)(A)(i) from unduly influencing the ETF by the threat of a large-scale redemption.

[135] The proposed rule would not permit an investment company that has acquired ETF shares in excess of the limits in section 12(d)(1)(A)(i) of the Act in reliance on proposed rule 12d1–4(a) to rely on proposed rule 6c–11(d) with regard to the purchase of basket assets (*i.e.,* the purchase of securities identified in the basket when redeeming ETF shares). Proposed rule 6c–11(d).

[136] 15 U.S.C. 80a–22(e).

[137] In their applications, ETFs acknowledge that no relief obtained from the requirements of section 22(e) will affect any obligations that they may otherwise have under rule 15c6–1 under the Exchange Act. *See, e.g.*, In re Barclays Global Fund Advisors, Second Amended and Restated Application, File No. 812–11598, filed May 11, 2000 (''Barclays Foreign Application''), at 76 (available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549). Rule 15c6–1 requires that most securities transactions be settled within three business days of the trade date. 17 CFR 240.15c6–1.

designed to prevent.[138] They have represented that the ETF's SAI would disclose those local holidays (over the period of at least one year following the date of the SAI) that are expected to prevent the satisfaction of redemptions in seven days and the maximum number of days needed to satisfy redemption requests with respect to the foreign securities at issue.[139]

The delay in satisfying redemption requests seems reasonable under the circumstances described by the ETF sponsors because it is for a limited period of time and disclosed to investors. The proposed rule, therefore, would codify the relief from section 22(e) of the Act previously provided to ETFs. If an ETF has a foreign security in its basket assets and a foreign holiday prevents timely delivery of the foreign security, the ETF would be exempt from the prohibition in section 22(e) against postponing the date of satisfaction upon redemption for more than seven days. To rely on this exemption, the ETF would be required to disclose in its SAI the foreign holidays it expects to prevent timely delivery of the foreign securities and the maximum number of days it anticipates it would need to deliver the foreign securities. Finally, the delivery would have to take place no more than 12 calendar days after the tender of ETF shares (in a creation unit).[140]

We request comment on this relief in the proposed exemption. Is the relief necessary? We specifically request comment from ETFs regarding the frequency with which they have relied on this exemption. Could an ETF pay cash (as part of the basket assets) in lieu of foreign securities in the case of delays in settlement? Should the relief be limited to ETFs that satisfy redemptions entirely through in-kind transactions? Is the number of days in the proposed rule sufficient or is it too long? Should the rule refer to the applicable local market's settlement cycle without specifying a number of days? Should the disclosure be included in the prospectus of the ETF instead of the SAI, which is only delivered upon request? Should the disclosure be included in any sales literature of the ETF?

The rule would provide relief if the ETF's basket assets include a foreign security. Should the rule also provide relief if an ETF has foreign securities included in its portfolio and, if so, why? Would actively managed ETFs present any issues with respect to this exemption that do not exist with respect to index-based ETFs? Could the investment adviser to an actively managed ETF manage the ETF so as to comply with section 22(e)?

The proposed rule defines ''foreign security'' to mean any security issued by a government or any political subdivision of a foreign country, a national of any foreign country, or a corporation or other organization incorporated or organized under the laws of any foreign country, and for which there is no established United States public trading market as that term is used in Item 201 of Regulation S–K under the Exchange Act. Use of the phrase ''established United States public trading market'' is designed to limit this relief to ETFs that invest in securities that do not have an active trading market in the United States. The rule does not rely on registration status because an unregistered large foreign private issuer may have an active U.S. market for its securities, in which case the ETF should be able to meet redemption requests in a timely manner.[141]

We request comment on the definition of ''foreign security.'' Should the definition provide any additional exceptions?

D. Disclosure Amendments

Congress enacted the federal securities laws to promote fair and honest securities markets, and an important purpose of these laws is to promote full and fair disclosure of important information by issuers of securities to the investing public. The Securities Act and the Exchange Act, as implemented by Commission rules and regulations, provide for systems of mandatory disclosure of certain material information in securities offerings and in periodic reports. Accordingly, the Securities Act requires delivery of a prospectus meeting the requirements of section 10(a) to each investor in a registered offering.[142] The Securities Act also requires dealers in a security, for a specified period of time after the registration statement for the security becomes effective, to deliver a final prospectus to purchasers, including to most persons purchasing shares in secondary market transactions.[143] The Investment Company Act, however, requires dealers to continue prospectus delivery to investors in open-end funds, including ETFs, which continuously offer their securities to the public.[144]

1. Delivery of Prospectuses to Investors

Our orders generally have exempted broker-dealers selling ETF shares from the obligation to deliver prospectuses in most secondary market transactions.[145]

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[138] *See Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency,* 76th Cong., 3d Sess. 291–293 (statements of David Schenker).

[139] *See, e.g.*, Barclays Foreign Application, *supra* note 137, at 76–84.

[140] Proposed rule 6c–11(c). Applicants requesting this exemptive relief generally have represented that they would be able to deliver redemption proceeds within 12 calendar days. See, *e.g.*, WisdomTree Notice, *supra* note 12. An ETF relying on this exemption would disclose the information in the SAI. *See* Item 18 of Form N–1A (requiring disclosures regarding purchase, redemption, and pricing of shares).

[141] *See* Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty To File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, Securities Exchange Act Release No. 55540 (Mar. 27, 2007) [72 FR 16934 (Apr. 5, 2007)] (adopting rule 12h–6 under the Exchange Act, which permits a foreign issuer to terminate its Exchange Act registration and reporting obligations regarding a class of equity securities if the average daily trading volume (''ADTV'') of the securities in the United States has been 5 percent or less of the ADTV of that class of securities in the issuer's principal trading market during a recent 12-month period, regardless of the size of its U.S. public float).

[142] 15 U.S.C. 77j(a). This is known as a ''final prospectus.'' In 2005, the Commission adopted rule 172 under the Securities Act which generally deems final prospectus delivery satisfied when the prospectus is filed with the Commission (''access equals delivery''). 17 CFR 230.172. The Commission, however, specifically excluded registered investment companies from rule 172. *See* Securities Offering Reform, Securities Act Release No. 8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)]. For a detailed discussion on the prospectus delivery requirements and related liabilities with respect to open-end investment companies, *see* Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Investment Company Act Release No. 28064 (Nov. 21, 2007) [72 FR 67790 (Nov. 30, 2007)] (''Enhanced Disclosure Proposing Release'') at sections II.B.1 and II.B.4.

[143] Under section 4(3) of the Securities Act, dealers must deliver a prospectus in connection with original sales by the dealer of securities obtained from or through an underwriter, and resales by the dealer occurring during the 40 days (90 days for first-time issuers) after the effective date of the registration statement (or, under certain circumstances, a different date). This aftermarket delivery obligation applies to all dealers, whether or not they participated in the offering itself. 15 U.S.C. 77d(3). *See also* rule 174 under the Securities Act, which provides an exception from the requirement in section 4(3) that a prospectus be delivered prior to the expiration of the applicable 40-day or 90-day period. 17 CFR 230.174.

[144] Section 24(d) of the Act eliminates the dealer's exception with respect to securities issued by funds and UITs on the theory that, because those issuers continuously offer their securities to the public, all dealers should be compelled to use the statutory prospectus. *See* H.R. Rep. No. 1542, 83d Cong., 2d Sess. 29–30 (1954).

[145] Most of the orders have granted exemptions from section 24(d) of the Act, which makes inapplicable the dealer exception in section 4(3) of the Securities Act to transactions in redeemable securities issued by an open-end fund. 15 U.S.C. 80a–24(d); 15 U.S.C. 77(d)(3); *see, e.g.*, WisdomTree Notice, *supra* note 12, at n.14. ETFs that have this relief continue to be subject to prospectus delivery requirements in connection with sales of creation units and other non-secondary market transactions. Our most recent orders permitting certain actively managed ETFs do not, however, provide this exemption. *See* Actively Managed ETF Orders, *supra* note 20.

Applicants have represented that broker-dealers would instead deliver a ''product description'' containing basic information about the ETF and its shares.[146] Proposed rule 6c–11 would not include a similar exemption, and thus broker-dealers would be required to deliver a prospectus meeting the requirements of section 10(a) of the Securities Act to investors purchasing ETF shares.[147]

We understand that many, if not most, broker-dealers selling ETF shares in secondary market transactions do, in fact, transmit a prospectus to purchasers, and thus they have not relied on the exemptions we have provided in our orders. More important, we believe an exemption allowing dealers to deliver product descriptions would be unnecessary given our proposal regarding summary prospectus disclosure. As discussed below,[148] we recently proposed amendments to Form N–1A and to rule 498 under the Securities Act,[149] in order to enhance the disclosures that are provided to mutual fund investors (''Enhanced Disclosure Proposing Release'').[150] The proposed amendments, if adopted, would require key information to appear in plain English in a standardized order at the front of the mutual fund prospectus (''summary section'').[151] A person could satisfy its mutual fund prospectus delivery obligations under section 5(b)(2) of the Securities Act by sending or giving this key information directly to investors in the form of a summary prospectus and providing a prospectus that meets the requirements of section 10(a) of the Securities Act (''statutory prospectus'') on an Internet Web site.[152] If adopted, broker-dealers selling ETF shares could deliver a summary prospectus in secondary market transactions. We believe the summary prospectus would contain material information that may not be included in a product description, but, like the product description, would be in a form that would be easy to use and readily accessible.

We request comment on this approach. Are we correct in our understanding that many, if not most, broker-dealers deliver a prospectus instead of a product description in connection with sales of ETF shares in secondary market transactions? If so, why?

If we were to adopt rule 6c–11 before the amendments proposed in the Enhanced Disclosure Proposing Release, we would expect to permit delivery of a product description in lieu of a prospectus, pending final determination of that proposal by the Commission. We request comment on this approach. Should we permit all ETFs, including actively managed ETFs and index-based ETFs that rely on the rule instead of an exemptive order to deliver product descriptions? Should we prescribe the form of the product description? For example, should we propose specific requirements for product descriptions that would provide ETF investors with information similar to that received by traditional mutual fund investors, such as the fee table, name and length of service of the portfolio manager, and return information, as noted above? Alternatively, should the product description conform to the disclosures in the summary section as proposed in Section III.D.2 below? [153] If so, are there any additional disclosures to those in the proposed summary section that ETFs should be required to include in a product description? Are there any disclosures in the proposed summary section that ETFs should not be required to include in the product description?

If we do not adopt the amendments proposed in the Enhanced Disclosure Proposing Release, we would anticipate that dealers in ETF shares will nevertheless continue their current practice of delivering prospectuses to investors. We request comment on whether the rule should require dealers to deliver prospectuses instead of product descriptions.[154] ETFs are becoming more like traditional mutual funds in several respects. As discussed above, when we began issuing exemptive orders to ETFs, they had basic investment objectives (to track a widely-followed index) and simple investment techniques (investment in all, or a representative sample of, the securities of a widely followed index).[155] Soon, however, some ETFs will be actively managed and have portfolio managers whose role is important to the success of the fund.[156] ETF operations, investment objectives, expenses, and other characteristics may become more varied as well. Because prospectuses contain information in a standardized form prescribed by the Commission, the use of these disclosure forms could promote greater uniformity in the content and level of disclosure among ETFs.[157] In addition, as discussed below, we are proposing to amend Form N–1A to include additional information relevant to a retail investor in an ETF, who does not typically buy or redeem individual shares directly from the fund.

If we were to retain the prospectus delivery exemption for broker-dealers, should the exemption be limited to index-based ETFs or only to certain index-based ETFs, such as those that replicate the components of a broad-based stock market index? If we were to retain the exemption, should we require broker-dealers to deliver prospectuses instead of product descriptions to purchasers of actively managed ETF shares?

2. Amendments to Form N–1A

We are proposing several amendments to Form N–1A, the registration form used by open-end management investment companies to register under the Act and to offer their securities under the Securities Act, to accommodate the use of this form by ETFs. The proposed amendments for ETF prospectuses are designed to meet the needs of investors (including retail investors) who purchase shares in secondary market transactions rather than financial institutions purchasing creation units directly from the ETF.

We request comment on our proposal to amend Form N–1A to meet the needs of secondary market investors. Is this

[146] *See, e.g.*, Ziegler Notice, *supra* note 110. The product description provides a summary of the salient features of the ETF and its shares, including the investment objectives of the fund, the manner in which ETF shares trade on the secondary market, and the manner in which creation units are purchased and redeemed. National securities exchanges on which ETFs are listed have adopted rules requiring the delivery of product descriptions. *See, e.g.*, American Stock Exchange Rules 1000 and 1000A.

[147] 15 U.S.C. 77j(a). This prospectus delivery requirement would apply to all ETFs, including ETFs operating under current exemptive orders. Therefore, we propose to amend orders we issued to open-end ETFs to exclude the section 24(d) exemption we have issued to existing ETFs. *See* infra Section III.E for a discussion of this proposed amendment to existing orders.

[148] *See infra* notes 176–185 and accompanying text.

[149] 17 CFR 230.498.

[150] *See* Enhanced Disclosure Proposing Release, *supra* note 142.

[151] *See id.*, at Section II.A.

[152] 15 U.S.C. 77j(a). The fund also would be required to provide additional information on its Web site. *See* Proposed rule 498(c).

[153] *See infra* notes 175–189 and accompanying text.

[154] For a discussion of the additional burdens associated with the requirement that broker-dealers deliver prospectuses in secondary market transactions involving ETF shares, *see infra* discussion at Section VIII.

[155] *See supra* note 10 and accompanying text.

[156] The investment objectives and techniques of index-based ETFs also have become more complex. Some ETFs today follow specialized or custom-designed indexes; others are leveraged through use of futures contracts and other types of derivative instruments.

[157] Certain disclosures required by Form N–1A that generally are not included in product descriptions may be important to some investors given the evolution of ETFs. Product descriptions do not, for example, include a fee table itemizing the ETF's expenses, or the name and length of service of the portfolio manager.

distinction we propose to draw between purchasers of shares in secondary market transactions and purchasers of creation units from the fund appropriate? Should we instead revise Form N–1A to include the additional disclosure (as discussed below) we are proposing today for secondary market investors without eliminating (as discussed below) certain disclosures relevant to creation unit purchasers? Would secondary market investors be confused if Form N–1A included disclosure relevant to both types of investors?

Purchasing and Redeeming Shares. We propose to amend Item 6 of Form N–1A to eliminate the requirement that ETF prospectuses disclose information on how to buy and redeem shares of the ETF because it is not relevant to secondary market purchasers of ETF shares.[158] Instead ETF prospectuses would simply state the number of shares contained in a creation unit (*i.e.* the amount of shares necessary to redeem with the ETF) and that individual shares can only be bought and sold on the secondary market through a broker-dealer.[159] Similarly, we also would amend Item 3 to exclude from the fee table fees and expenses for purchases or sales of creation units.[160] Instead, the proposed amendment would require an ETF to modify the narrative explanation preceding the example in the fee table to state that individual ETF shares are sold on the secondary market rather than redeemed at the end of the periods indicated, and that investors in ETF shares may be required to pay brokerage commissions that are not reflected in the fee table.[161]

We request comment on our assumption that investors (including most individual investors) purchasing their shares in secondary market transactions do not need to know information on how creation units are purchased and redeemed, or the payment of transaction fees by investors purchasing or redeeming creation units. If they do need this information, why?

ETFs would still be required to include disclosure on how creation units are offered to the public in the SAI.[162] We are not proposing to amend this disclosure to include information on creation unit redemption, which Item 6 currently requires and which we propose to eliminate. Should we amend the SAI to include the disclosure requirements we are proposing to eliminate from Item 6? Should we require that the information in the SAI regarding the purchase of creation units also specify associated fees and expenses? As an alternative, should we require purchase and redemption information and associated fees and expenses to remain in Item 3 and Item 6 only for prospectuses provided to investors purchasing creation units, such as in the form of a supplementary prospectus?

The proposed alternative disclosures in Items 3 and 6 would not be available, however, to ETFs with creation units of less than 25,000 shares because more retail investors would be able to transact directly with an ETF that has smaller-sized creation units.

We request comment on whether the exemptions we are providing from Items 3 and 6 of Form N–1A should be based on the size of the creation unit, and whether 25,000 shares per creation unit is an appropriate threshold. Should it be higher or lower? Should we instead adopt a threshold based on the value of shares rather than the number of shares?

Total Return. We propose to modify instructions to several items that require the use of the ETF's NAV to determine its return. In addition to returns based on NAV, ETFs also would be required to include returns based on the market price of fund shares.[163] As discussed above, returns based on market price may be different than returns based on the fund's NAV and better relate to an ETF investor's experience in the fund.

We request comment on whether use of market prices, in addition to NAV, would provide secondary market purchasers of ETF shares with meaningful information on their investments. Alternatively, should we require returns to be computed solely using market prices? Would investors find it confusing to have fund returns presented using both market price and NAV? Should we limit this amendment to ETFs with creation units of 25,000 shares or more because more retail investors may be able to transact directly with the ETF in the event of smaller creation units?

For purposes of determining ETF returns, we would define ''market price'' as the last price at which ETF shares trade on their principal U.S. trading market during a regular trading session (*i.e.* closing price).[164] Is this an appropriate definition for market price, or should we instead (or in addition) define the market price as the mid-point price between the highest bid and the lowest offer on the principal U.S. market on which the ETF shares are traded, at the time the fund's NAV is calculated?[165]

Premium/Discount Information. We propose to require that each ETF disclose to investors information about the extent and frequency with which market prices of fund shares have tracked the fund's NAV.[166] This disclosure, which would be required on the fund's Internet Web site and included in its prospectus, is a condition to relief in ETF exemptive orders.[167] Proposed rule 6c–11 also would require each ETF to disclose on its Internet Web site the prior business day's last determined NAV, the market

[158] Proposed Item 6(h)(1) of Form N–1A.

[159] Proposed Item 6(h)(3) of Form N–1A.

[160] Proposed Instruction 1(e)(i) to Item 3 of Form N–1A.

[161] Proposed Instruction 1(e)(ii) to Item 3 of Form N–1A. We also are proposing a conforming amendment to the fee table in ETF annual and semi-annual reports. Proposed Instruction 1(e) to Item 22(d) of Form N–1A.

[162] Item 18(a) of Form N–1A.

[163] We propose to amend the average annual return table to include a separate line item for returns based on the market price of ETF shares. Proposed Instruction 5(a) to Item 2(c)(2) of Form N–1A. This would codify, with modifications, a condition in ETF exemptive orders. *See, e.g.,* Ziegler Notice, *supra* note 110. The condition in our exemptive orders did not specify the location of the disclosure in the prospectus. As a result, ETFs include an additional table in the prospectus, rather than including market price returns in the average annual returns table required by Item 2. In addition, ETFs use different time periods for the disclosure, with some using calendar years and others fiscal years. The proposed amendment would eliminate use of a second table, which may confuse investors. It also would standardize the reporting period by requiring all ETFs to present the information using calendar years.

We also propose to amend the financial highlights table to require ETFs to calculate total return at market prices in addition to returns at NAV. This proposed amendment would provide secondary market investors with more pertinent information as to the effect of market price movements on their investments. Proposed Instruction 3(f) to Item 8(a) of Form N–1A. Under the proposed amendment, ETFs would be required to include two bar charts under Item 2 of the form; one using market price returns and one using NAV returns. *See* Instruction 1(a) to Item 2(c)(2) of Form N–1A.

[164] Proposed definition of ''Market Price'' in General Instruction A of Form N–1A. We consider the closing price to be the strongest indicator of market value. *See* Codification of Financial Reporting Policies, Section 404.03.b.ii, ''Valuation of Securities—Securities Listed for Trading on a National Securities Exchange,'' reprinted in SEC Accounting Rules (CCH) ¶ 38,221 (''ASR 118''), at 38, 424–38, 425. *See also* Fair Value Measurements, Statement of Financial Accounting Standards No. 157, § 24 (Fin. Accounting Standards Bd. 2006) (''FASB 157'') (''[A] quoted price in an active market provides the most reliable evidence of fair value and shall be used to measure fair value whenever available.'').

[165] In circumstances where closing price may be less accurate because the last trade occurred at a much earlier point in the day than NAV calculation, some ETFs have used the mid-point price, rather than the closing price. *See, e.g.*, Claymore Exchange-Traded Fund Trust, Investment Company Act Release No. 27469 (Aug. 28, 2006) [71 FR 51869 (Aug. 31, 2006)].

[166] Proposed Item 6(h)(4) to Form N–1A.

[167] *See, e.g.,* WisdomTree Notice *supra* note 12; Zeigler Notice *supra* note 110.

closing price of its shares and the premium/discount of the closing price to NAV.[168] This disclosure is designed to alert investors to the current relationship between NAV and the market price of the ETF's shares, and that they may sell or purchase ETF shares at prices that do not correspond to the NAV of the fund.

Proposed Item 6(h)(4) of Form N–1A would require disclosure in the ETF prospectus of the number of trading days, during the most recently completed calendar year and quarters since that year, on which the market price of the ETF shares was greater than the fund's NAV and the number of days it was less than the fund's NAV (premium/discount information).[169] In addition to alerting investors that the ETF's NAV and share price may differ, this disclosure also would provide historical information regarding the frequency of these deviations. In light of the historical premium/discount disclosure in the ETF prospectus and in order to avoid duplicative disclosures that may result in additional regulatory burdens, proposed rule 6c–11, unlike the exemptive orders, would not require ETFs to include historical premium/discount information on their Internet Web sites.

We request comment on whether daily and historical premium/discount information, which ETFs currently provide, is useful to investors. One commenter to the 2001 Concept Release suggested that investors need not receive premiums/discounts against NAV disclosure because the more useful information is the Intraday Value of the fund's basket as disseminated by national securities exchanges at regular intervals.[170] This information, according to the commenter, provides investors with contemporaneous pricing of the fund's portfolio and enables the investor to see, at the time his order is entered, whether the Intraday Value is close to (or between) the bid-asked price.

We request comment on whether investors need premium/discount disclosure in light of the dissemination of the ETF's Intraday Value at regular intervals during trading hours. We request ETF sponsors commenting on this condition of the rule to provide us with data regarding the frequency with which visitors to their Internet Web sites access this information. In addition to current premium/discount information, should we also require ETF Web sites to provide historical premium/discount information as is currently required by exemptive orders? If the Web site includes historical premium/discount information, should the rule also require historical information in Form N–1A? If so, over what periods?

Periodic Report Information. We are proposing conforming amendments to ETF return information in ETF annual reports. The proposed amendments would require each ETF to use the market price of fund shares in addition to NAV to determine its return,[171] and include a table with premium/discount information for the five recently completed fiscal years.[172]

We request comment on whether it is necessary to include similar disclosure in both the prospectus and annual report of an ETF. Should ETFs that provide this information on their Internet Web sites be exempt from this annual report requirement? Is it necessary for the ETF to provide premium/discount data for the most recently completed five fiscal years? Should the reporting period conform to that proposed under Item 6 of the form (*i.e.*, one calendar year and most recent quarters since that year)?

We also are proposing to amend the prospectus and annual report requirements of Form N–1A to require an index-based ETF to compare its performance to its underlying index rather than a benchmark index.[173] This amendment would permit use of a narrow-based or affiliated index and eliminate the opportunity for an index-based ETF to select an index different from its underlying index which should better reflect whether the ETF's performance corresponds to the index the performance of which it seeks to track.[174]

We request comment on whether it is appropriate to require an index-based ETF to compare its performance to its underlying index. Should an index-based ETF that tracks an index compiled by an affiliated index provider use a benchmark index instead of, or in addition to, its underlying index? Should an index-based ETF that tracks a fundamental or other custom-designed index use a benchmark index instead of, or in addition to, its underlying index?

Summary Prospectus. As noted above, we recently issued the Enhanced Disclosure Proposing Release, which would require key information to appear in plain English in a summary section of the prospectus.[175] In addition, a person could satisfy its mutual fund delivery obligations under section 5(b)(2) of the Securities Act by delivering the summary prospectus to investors and providing a statutory prospectus on an Internet Web site. Upon request, a fund also would be required to send the statutory prospectus to the investor.[176]

As proposed, the summary section would include certain key information, which also would comprise the information in the summary prospectus. This key information would include: (i) Investment objectives;[177] (ii) costs;[178]

[168] Proposed rule 6c–11(e)(4)(iv).

[169] Consistent with current orders, ETFs would be required to present premiums or discounts as a percentage of NAV. They also would be required to explain that shareholders may pay more than NAV when purchasing shares and receive less than NAV when selling, because shares are bought and sold at market prices. Proposed Instructions 2, 3 to Item 6(h)(4) of Form N–1A. In addition, the amendments also would require each ETF to identify the trading symbol(s) and principal U.S. market(s) on which the shares are traded. Proposed Item 6(h)(2) of Form N–1A.

[170] *See* Comment Letter of Nuveen Investments, File No. S7–20–01 (Jan. 14, 2002). *See also* Gastineau, *supra* note 17, at 230–241.

[171] Proposed Instruction 12(b) to Item 22(b)(7) of Form N–1A. This proposed disclosure would be identical to proposed Instruction 5(a) to Item 2(c)(2) of Form N–1A. *See supra* note 163. We also are proposing to require ETFs to include a new line graph comparing the initial and subsequent account values using market price, following the line graph using NAV required by Item 22(b)(7)(ii)(A) of Form N–1A. Proposed Instruction 12(a) to Item 22(b)(7) of Form N–1A. Consistent with the amendments proposed above, this proposed amendment also is designed to provide individual investors with the effect of market price fluctuations on their investment.

[172] Proposed Item 22(b)(7)(iv) of Form N–1A. Although similar to the proposed disclosure amendment to the shareholder information in Item 6 of the form, this proposed disclosure would span a longer, and different, reporting period: five fiscal years instead of the most recent calendar year and quarter(s). *See* Proposed Item 6(h)(4) of Form N–1A. The proposed amendment would require fiscal year disclosure to conform to currently required disclosure in Item 22(b)(7). We are also proposing to include instructions similar to those proposed in Item 6 to assist funds in meeting this proposed disclosure obligation. Proposed Instructions to Item 22(b)(7)(iv) of Form N–1A.

[173] Proposed Instruction 5(b) to Item 2(c)(2) of Form N–1A; Proposed Instruction 12(c) to Item 22(b)(7) of Form N–1A.

[174] Item 2(c)(2)(iii) of Form N–1A; Instruction 12(c) to Item 22(b)(7) of Form N–1A. The form requires use of a broad-based index and prohibits use of affiliated indexes unless widely used and recognized. Our amendment would require ETFs that track narrow, custom indexes or affiliated indexes, to use the underlying index when presenting this return information.

[175] *See supra* notes 148–152 and accompanying text. References to Form N–1A amendments in the Enhanced Disclosure Proposing Release, *supra* note 142, are to the ''proposed summary prospectus.''

[176] *See* Enhanced Disclosure Proposing Release, *supra* note 142, at Section II.B (proposed rule 498 under the Securities Act).

[177] *See id.,* at n.43 and accompanying text (proposed summary prospectus Item 2 of Form N–1A). This is the same information required by current Item 2(a) of Form N–1A.

[178] *See id.,* at nn.44–55 and accompanying text (proposed summary prospectus Item 3 of Form N–1A). This information would be substantially the same as that required by current Item 3 of Form N–1A (the risk/return summary fee table and example), except for proposed amendments that would: (i) Require funds that offer discounts on

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(iii) principal investment strategies, risks, and performance;[179] (iv) the fund's top ten portfolio holdings as of the end of its most recent calendar quarter;[180] (v) identity of investment advisers and portfolio managers;[181] (vi) brief purchase and sale and tax information;[182] and (vii) financial intermediary compensation.[183] This information is drawn largely from the current risk/return summary and rule 498 fund profile.[184] In addition, the summary prospectus would be required to include on the cover page or at the beginning: (i) The fund's name and the share classes to which the summary prospectus relates; (ii) a statement identifying the document as a ''summary prospectus''; (iii) the approximate date of the summary prospectus's first use; and (iv) the following legend:

> Before you invest, you may want to review the Fund's prospectus, which contains more information about the Fund and its risks. You can find the Fund's prospectus and other information about the Fund online at [_____]. You can also get this information at no cost by calling [_____] or by sending an e-mail request to [_____].[185]

If adopted, the amendments to Form N–1A and rule 498 proposed in the Enhanced Disclosure Proposing Release would require open-end ETFs to include the summary section in their prospectuses and permit persons to satisfy their prospectus delivery obligations by sending or giving the summary prospectus and providing the statutory prospectus on an Internet Web site in the manner set forth in the proposed rules. Today, we also propose that, if the Enhanced Disclosure Proposing Release is adopted, ETFs include in the summary section of their prospectuses, and in their summary prospectuses, the additional proposed disclosures discussed above. Specifically, we would modify the amendments proposed in the Enhanced Disclosure Proposing Release to include our proposed amendments to ETF disclosures as follows: (i) Our proposed amendments regarding disclosures about creation units and the purchase and sale of individual ETF shares would be included in proposed summary prospectus Item 7, which would require brief purchase and sale information;[186] (ii) the additional information on market price returns would be included in proposed summary prospectus Item 4, which includes the risk/return summary, bar chart and table;[187] and (iii) premium/discount information would be included in proposed summary prospectus Item 7 (purchase and sale information).[188] We also would permit ETFs to exclude proposed information regarding the purchase and sale of creation units consistent with our proposal today.[189]

We request comment on whether ETFs should send or give the proposed additional items in the summary prospectus. If so, should any information from the statutory prospectus, in addition to the items that we are proposing today, be included in the summary section of an ETF's prospectus and, therefore, in its summary prospectus? Should ETFs not be required to include certain items in the summary section? For example, in light of the transparency of portfolio holdings of an ETF, should ETFs not have to include the top ten portfolio holdings? Should ETFs be permitted or required to locate any of the specific disclosures proposed in this release or in the Enhanced Disclosure Proposing Release elsewhere in the prospectus outside the summary section?

E. Amendment of Previously Issued Exemptive Orders

As discussed above, our orders have exempted ETFs from compliance with section 24(d) of the Act to relieve dealers from delivering prospectuses to investors in secondary market transactions. We are proposing today not to include such an exemption in rule 6c–11 to ensure that broker-dealers are subject to the same delivery requirements with respect to all ETFs.[190] In addition, we are proposing amendments to Form N–1A that would

front-end sales charges for volume purchases (*i.e.* breakpoints) to include a brief narrative disclosure alerting investors to the availability of those discounts; (ii) revise the parenthetical following the heading ''Annual Fund Operating Expenses'' to read ''ongoing expenses that you pay each year as a percentage of the value of your investment'' in place of ''expenses that are deducted from Fund assets''; (iii) require funds to add brief disclosure regarding portfolio turnover immediately following the fee table example; and (iv) permit funds to include additional captions directly below the ''Total Annual Fund Operating Expenses'' caption in cases where there were expense reimbursement or fee waiver arrangements that reduced fund operating expenses and that will continue to reduce them for no less than one year from the effective date of the fund's registration statement.

[179] *See id.,* at nn.56–57 and accompanying text (proposed summary prospectus Item 4 of Form N–1A). This would include the same information required by current Items 2(b) and (c) of Form N–1A.

[180] *See id.,* at nn.58–66 and accompanying text (proposed summary prospectus Item 5 of Form N–1A). This information currently is not required in a fund's prospectus. The proposal would allow funds to list an amount not exceeding five percent of the total value of the portfolio holdings in one amount as ''Miscellaneous securities'' provided certain specified conditions are met. *Id.* at n.66 and accompanying text (proposed Instruction 3 to proposed summary prospectus Item 5 of Form N–1A).

[181] *See id.,* at nn.67–72 and accompanying text (proposed summary prospectus Item 6 of Form N–1A) (proposing that a fund disclose the name of each investment adviser and sub-adviser of the fund, followed by the name, title, and length of service of the fund's portfolio managers). This information is similar to disclosures required by current Item 5 of Form N–1A. Certain additional disclosures regarding investment advisers and portfolio managers that are currently required in the statutory prospectus would continue to be required in the statutory prospectus, but not in the summary section. *See id.,* at n.68.

[182] *See id.,* at nn.73–74 and accompanying text (proposed summary prospectus Item 7 of Form N–1A) (proposing that a fund disclose minimum initial or subsequent investment requirements, the fact that the shares are redeemable, and identify the procedures for redeeming shares (*e.g.*, on any business day by written request, telephone, or wire transfer)), and nn.75–76 and accompanying text (proposed summary prospectus Item 8 of Form N–1A) (proposing that a fund state, as applicable, that it intends to make distributions that may be taxed as ordinary income or capital gains or that the fund intends to distribute tax-exempt income, and proposing that a fund that holds itself out as investing in securities generating tax-exempt income provide, as applicable, a general statement to the effect that a portion of the fund's distributions may be subject to federal income tax).

[183] *See id.,* at nn.77–78 and accompanying text (proposed summary prospectus Item 9 of Form N–1A) (proposing that a fund provide disclosure that, if an investor purchases the fund through a broker-dealer or other financial intermediary (such as a bank), the fund and its related companies may pay the intermediary for the sale of fund shares and related services, and state that these payments may influence the broker-dealer or other intermediary and the salesperson to recommend the fund over another investment).

[184] Registrants would not be permitted to include any additional information in the summary section. *See id.,* at n.37 and accompanying text (proposed summary prospectus General Instruction C.3.(b) of Form N–1A).

[185] *See id.,* at n.98 and accompanying text (proposed rule 498(b)(1) under the Securities Act).

[186] The disclosures in our proposed Items 6(a)(1), 6(h)(2) and 6(h)(3) to Form N–1A would be included in proposed summary prospectus Item 7 of Form N–1A. As noted, our proposed amendments also would require the ETF to modify the narrative explanation preceding the example in the fee table, *see supra* note 160, which would remain in current Item 3 of Form N–1A.

[187] Our proposed instructions 5(a) and (b) to the risk return bar chart and table (current Item 2(c)(2) of Form N–1A), *see* note 163 and accompanying and following text, would be added to the end of the proposed instructions to proposed summary prospectus Item 4.

[188] The disclosure in our proposed Item 6(h)(4) to Form N–1A, *see* notes 167–169 and accompanying and following text, would be included at the end of proposed summary prospectus Item 7 of Form N–1A. Our proposed amendments to the financial highlights (current Item 8 of Form N–1A) and the financial statements (current Item 22 of Form N–1A) would be included in the proposed summary prospectus Items 14 and 28 of Form N–1A, respectively.

[189] ETFs would be permitted to exclude from the fee table (current Item 3 and proposed summary prospectus Item 3 of Form N–1A) the fees and expenses associated with creation unit purchases and redemptions and would be permitted to exclude the disclosure required by proposed summary prospectus Items 7(a) and 7(b) of Form N–1A. *See supra* notes 158–160 and accompanying text.

[190] *See supra* Section III.D.1.

revise the prospectus requirements in that form in order to provide more useful information to investors in ETF shares. Therefore, pursuant to our authority under section 38(a) of the Act, we propose to amend the exemptive orders we have issued to ETFs that are open-end funds to eliminate the section 24(d) exemptions and require ETFs to satisfy their statutory prospectus delivery requirements.[191]

The consequence of the amendment to these orders, if adopted, would be to put ETFs that have received exemptive orders on the same footing as ETFs that may in the future rely solely on rule 6c–11, and thus eliminate any competitive advantage they might otherwise obtain by having obtained orders before adoption of the rule.[192] The amendment would be limited to orders issued to ETFs seeking to operate as open-end management companies.

We are not proposing to rescind the orders we have issued because we do not believe rescission would be necessary to eliminate competitive advantages for ETFs that have already received exemptive orders. With the exception of the section 24(d) exemption (and the related prospectus disclosure requirements), the proposed rule contains broader exemptive relief than that provided in our orders and therefore we expect most, if not all, ETFs would rely on the rule if and when it is adopted.

We request comment on whether we should rescind our previous orders. Is our assumption correct that most ETFs that have orders would rely on the rule?

IV. Exemption for Investment Companies Investing in ETFs

A. Background

As we discussed above, institutional investors, including funds, have invested in ETFs to achieve asset allocation, diversification, or other investment objectives.[193] Some funds invest primarily in ETFs. A fund's ability to invest in ETFs, however, is limited because section 12(d)(1) of the Act prohibits a fund (and companies or funds it controls) (''acquiring fund'') from:

(i) Acquiring more than three percent of any other investment company's outstanding voting securities (''acquired fund'');

(ii) Investing more than five percent of its total assets in any one acquired fund; or

(iii) Investing more than ten percent of its total assets in all acquired funds.[194]

Section 12(d)(1) was enacted to limit so-called ''fund of funds'' arrangements. Congress was concerned about ''pyramiding,'' a practice under which investors could use a limited investment in an acquiring fund to gain control of another (and potentially much larger) fund and use the assets of the acquired fund to enrich themselves at the expense of acquired fund shareholders.[195] Control could be exercised either directly (such as through holding a controlling interest) or indirectly (such as by coercion through the threat of large-scale redemptions).[196] Congress also was concerned about the potential for excessive fees when one fund invested in another,[197] and the formation of overly complex structures that could be confusing to investors.[198] Congress imposed these limits, in part, based on our conclusion in 1966 that fund of funds structures served little or no economic purpose.[199]

Our views and those of Congress regarding the economic value of fund of funds arrangements have changed over the years as fund of funds arrangements have been created that serve new, legitimate purposes. Recognizing this, in 1996, Congress granted us specific authority to provide exemptions allowing fund of funds arrangements, and directed that we use it ''in a progressive way.'' [200] Pursuant to this

[191] Section 38(a) of the Act provides the Commission with the authority to amend orders when necessary or appropriate to the exercise of its powers conferred elsewhere in the Act. We are not proposing to amend the orders of UITs that have sought and obtained an exemption from section 24(d) of the Act because those ETFs do not prepare their prospectuses in accordance with Form N–1A.

[192] For the same purpose, we expect all funds seeking exemptive orders to operate an ETF after today to agree as a condition of the order that the requested order would expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of index-based or actively managed ETFs.

[193] *See supra* note 15 and accompanying text (funds also use ETFs for hedging purposes). *See also, e.g.*, iShares Trust, Investment Company Act Release No. 25969 (Mar. 21, 2003) [68 FR 15010 (Mar. 27, 2003)].

[194] *See* 15 U.S.C. 80a–12(d)(1)(A). Both registered and unregistered funds are subject to these limits with respect to their investments in a registered fund. Registered funds are also subject to these same limits with respect to their investments in an unregistered fund. Unregistered funds are not subject to limits on their investments in another unregistered fund. *Id.* ETFs are registered funds and therefore both registered and unregistered funds are subject to section 12(d)(1)(A)'s limits with respect to investments in ETFs. Section 12(d)(1)(B) prohibits a registered open-end fund from selling any security issued by the fund to any other fund (including unregistered funds) if, after the sale, the acquiring fund would: (i) Together with companies and funds it controls, own more than three percent of the acquired fund's voting securities; or (ii) together with other funds (and companies they control) own more than ten percent of the acquired fund's voting securities. 15 U.S.C. 80a–12(d)(1)(B).

[195] The legislative history of these provisions cites examples of controlling investors in an acquiring fund using ''pyramiding schemes'' to force acquired funds to purchase securities of companies in which the investors had an interest and to direct underwriting and brokerage business to broker-dealers they controlled. In an open-end fund, controlling investors were able to exert control and influence over acquired funds through the threat of large-scale redemptions. In the 1960s, Fund of Funds, Ltd., an unregistered foreign investment company, acquired controlling interests in several registered U.S. funds and was able to exert undue influence over the management of those acquired funds by threatening advisers to those funds with large redemptions. *See* SEC, Public Policy Implications of Investment Company Growth, H.R. Rep. No. 2337, 89th Cong., 2d Sess. at 315–16 (1966) (''1966 Study''). Congress enacted section 12(d)(1) to prevent these abuses and amended the section in 1970 to prevent similar abuses by investors in unregistered acquiring funds. Congress later amended section 12(d)(1) to give the Commission specific authority to provide exemptions from these limitations. *See infra* notes 200 and 214 and accompanying text.

[196] Large-scale redemptions may disrupt portfolio management or increase transaction fees if fund managers must hold cash or sell portfolio securities at an inopportune time to meet redemptions. Large-scale redemptions also may be threatening to a fund manager because they decrease the fund's assets under management, on which the manager's fee is based.

[197] Pyramiding schemes resulted in fund shareholders paying excessive charges due to duplicative fees at the acquiring and acquired fund levels. *See* SEC, Investment Trusts and Investment Companies, H.R. Doc. No. 279, 76th Cong., 1st Sess., pt.3, at 2721–95 (1939) (''Investment Trust Study''). *See also* Fund of Funds Investments, Investment Company Act Release No. 26198 (Oct. 1, 2003) [68 FR 58226 (Oct. 8, 2003)] (''Fund of Funds Proposing Release'') at nn.2–6 and accompanying text. For example, from 1927 to 1936, it was estimated that the duplication of expenses incurred by funds investing in other funds exceeded five percent of the total operating expenses for all management funds. *See* Investment Trust study, at 2727–2728. Fund of Funds, Ltd. also charged duplicative advisory fees at the acquiring and acquired fund levels, provided sales loads to an affiliated broker for each investment the acquiring fund made in an acquired fund, and directed brokerage to an affiliate of the fund of funds. *See* 1966 Study, *supra* note 195, at 318–320; *Arthur Lipper Corp., et al.* v. *SEC*, Securities Exchange Act Release No. 11773, 46 S.E.C. 78 (Oct. 24, 1975), *sanction modified*, 547 F.2d 171 (2d Cir. 1976) (a Fund of Funds, Ltd. affiliated broker-dealer received commissions under step-out arrangements with Arthur Lipper Corp, a registered broker-dealer, and other broker-dealers).

[198] Pyramiding of funds resulted in complicated corporate structures that were confusing to shareholders and made it difficult for shareholders to determine the nature and value of the holdings ultimately underlying each shareholder's investment. *See* Investment Trust study, *supra* note 197, at 2778–93.

[199] *See id.*, at 2725–41.

[200] *See* National Securities Markets Improvement Act of 1996, *Pub. L.* 104–290, § 202(4), 110 Stat. 3416, 3427 (1996) (''NSMIA''); H.R. Rep. No. 622, 104th Cong., 2d Sess., at 43–44 (1996) (''H.R. Rep. No. 622'') (discussing new section 12(d)(1)(J) of the Act that gives the Commission authority, by rule or order, to provide exemptions from the limits of section 12(d)(1) when it is consistent with the public interest and the protection of investors). In 1996, Congress also amended the Act to include a statutory exemption from section 12(d)(1) limits for funds that invest in funds in the same fund group.

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authority, we have provided exemptions to permit certain fund of funds arrangements that would otherwise be prohibited under section 12(d)(1). For example, in 2006 we adopted rule 12d1–1, which allows funds to invest in money market funds in excess of section 12(d)(1) limits.[201] We also have issued exemptive orders that allow many funds to invest in unaffiliated traditional funds (''multigroup fund orders'') and that allow the sale of shares issued by several ETFs to unaffiliated funds in excess of the statutory limits.[202] The exemptions provided under the rule and these orders facilitate the acquiring funds' ability to achieve their investment objectives by expanding their investment options to include investments in unaffiliated funds in a manner consistent with the protection of investors. These exemptions also increase the potential pool of investors and assets available for investment in ETFs and traditional funds.

ETF applicants have sought exemptive orders similar to those we have issued to funds investing in unaffiliated traditional funds.[203] The conditions included in those orders were designed to prevent the abuses that historically were associated with fund of funds arrangements and that led Congress to enact section 12(d)(1).[204] The conditions include: (i) Limits on the control and influence an acquiring fund can exert on the acquired fund; [205] (ii) limits on certain fees charged to the acquiring fund and its shareholders; [206] (iii) limits on the acquired fund's ability to invest in other funds; [207] (iv) the acquired fund and each acquiring fund must enter into an agreement stating that both funds understand the terms and conditions of the order and agree to fulfill their responsibilities under the order (''participation agreement''); [208] and (v) the acquiring fund provides a list of certain of its affiliates to the acquired fund.[209]

More recently, sponsors of some ETFs as well as managers of funds investing in ETFs have expressed concern to our staff that some of the conditions in the exemptive orders are burdensome and unnecessary in the context of a fund investment in an ETF, which is less likely to be subject to at least some of the abuses these conditions were designed to prevent.[210] For example, ETF sponsors have communicated to our staff that the participation agreement condition is cumbersome and costly because the ETFs must enter into an agreement with each acquiring fund and each acquiring fund seeks to negotiate different terms in its agreement.[211] They have suggested that we develop conditions that address the

NSMIA, section 202(5). *See also infra* note 214 and accompanying text.

[201] *See* Fund of Funds Investments, Investment Company Act Release No. 27399 (June 20, 2006) [71 FR 36640 (June 27, 2006)] (''Fund of Funds Adopting Release''); 17 CFR 270.12d1–1.

[202] *See, e.g.*, Schwab Capital Trust, *et al.*, Investment Company Act Release Nos. 24067 (Oct. 1, 1999) [64 FR 54939 (Oct. 8, 1999)] (notice) (''Schwab Notice'') and 24113 (Oct. 27, 1999) (order) (''Schwab Order''); First Trust Exchange-Traded Fund, *et al.*, Investment Company Act Release Nos. 27812 (Apr. 30, 2007) [72 FR 25795 (May 7, 2007)] (notice) and 27845 (May 30, 2007) (order); iShares Trust, *et al.*, Investment Company Act Release Nos. 25969 (Mar. 21, 2003) [68 FR 15010 (Mar. 27, 2003)] (notice) and 26006 (Apr. 15, 2003) (order).

[203] Fifteen orders have been issued to ETFs allowing other funds to invest in ETFs beyond the limits of section 12(d)(1). *See, e.g.*, iShares Trust, *et al.*, Investment Company Act Release No. 25969 (Mar. 21, 2003) [68 FR 15010 (Mar. 27, 2003)].

[204] *See, e.g.*, Schwab Notice and Order, *supra* note 202.

[205] The exemptive orders permitting investments in ETFs contain the following conditions relating to influence and control: (i) The acquiring fund's investment adviser or sponsor, any person in a control relationship with that investment adviser or sponsor, any investment company (including a company that would be an investment company but for the exceptions provided in sections 3(c)(1) and 3(c)(7) of the Act) that is advised or sponsored by the acquiring fund's investment adviser or sponsor, or any person in a control relationship with that investment adviser or sponsor cannot control the ETF within the meaning of section 2(a)(9) of the Act; (ii) neither the acquiring fund nor certain of its affiliates cause any existing or potential investment by the acquiring fund in ETF shares to influence the terms of any services or transactions between the acquiring fund or its affiliate and the ETF or an ETF affiliate; (iii) the board of directors (or trustees) of the acquiring fund, including a majority of the independent directors, adopts procedures reasonably designed to assure that the acquiring fund's investment adviser(s) is conducting the acquiring fund's investment program without taking into account any consideration received by the acquiring fund or an acquiring fund affiliate from the ETF or an ETF affiliate in connection with any services or transactions; (iv) the board of directors of an open-end ETF, including a majority of its independent directors, determines that any consideration paid by the ETF to the acquiring fund or an acquiring fund affiliate in connection with any services or transactions: (a) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the ETF; (b) is within the range of consideration that the ETF would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned; (v) neither the acquiring fund nor certain of its affiliates (except to the extent it is acting in its capacity as an investment adviser or sponsor to the ETF) causes the ETF to purchase a security in any affiliated underwriting (an underwriting in which an affiliate of the acquiring fund is a principal underwriter); (vi) the board of directors of an open-end ETF, including a majority of the independent directors, adopts procedures reasonably designed to monitor any purchases of securities by the ETF in an affiliated underwriting, including any purchases made directly from the affiliate, and the board reviews these purchases at least annually to determine whether the purchases were influenced by the acquiring fund's investment in the ETF, in its review the board must consider: (a) Whether the purchases were consistent with the ETF's investment objectives and policies; (b) how the performance of the purchased securities compares to the performance of comparable securities purchased during a comparable period of time in an unaffiliated underwriting or to a benchmark such as a comparable market index; and (c) whether the amount of securities purchased has changed significantly from prior years; and (vii) the ETF maintains and preserves permanently in an easily accessible place a written copy of the procedures designed to monitor purchases made in an affiliated underwriting and maintains and preserves for at least six years, the first two in an easily accessible place, a written record of each purchase (and the terms thereof) of securities in an affiliated underwriting and the information or materials upon which the board's determinations were made. *See, e.g.*, Healthshares(tm), Inc. and XShares Advisors LLC, Investment Company Act Release No. 27844 (May 29, 2007) [72 FR 30885 (June 4, 2007)] (''Healthshares(tm), Inc. and XShares Order'').

[206] The exemptive orders permitting investments in ETFs contain the following conditions relating to fee limits: (i) Before approving any advisory contract under section 15 of the Act, the board, including a majority of independent directors, finds that the advisory fees charged under the contract are based on services provided that are in addition to, rather than duplicative of, the services provided under the ETF advisory contract(s) and these findings and their basis are recorded in the minute books of the acquiring fund; (ii) the acquiring fund's adviser(s) (or if the acquiring fund is a UIT, its trustee or sponsor) waives fees payable to it by the acquiring fund in an amount at least equal to any compensation (including fees received pursuant to any 12b-1 plan) received from the ETF by the acquiring fund's adviser, trustee, or sponsor or an affiliated person of the acquiring fund's adviser, trustee, or sponsor (other than any advisory fees paid by the ETF to the adviser, trustee, or sponsor or its affiliated person) in connection with the acquiring fund's investment in the ETF; and (iii) any sales charge and/or service fees charged with respect to shares of the acquiring fund do not exceed the limits applicable to a fund of funds as set forth in Rule 2830 of the NASD Conduct Rules (or with respect to registered separate accounts that invest in a fund of funds, no sales load is charged at the acquiring fund level or ETF level and other sales charges and services fees, if any, are only charged at either the acquiring fund level or ETF level, not both). *See, e.g.*, Healthshares(tm), Inc. and XShares Order, *supra* note 205.

[207] Under the exemptive orders permitting investments in ETFs, the ETF may not invest in shares of other funds (including companies relying on sections 3(c)(1) and 3(c)(7) of the Act) in excess of the limits in section 12(d)(1)(A) of the Act (some orders allow a few exceptions to this condition, *see infra* note 225). *See, e.g.*, Healthshares(tm), Inc. and XShares Order, *supra* note 205.

[208] The exemptive orders require an agreement between the acquiring fund and the ETF stating that their boards and investment advisers, or their sponsors and trustees, as applicable, understand the terms and conditions of the order and agree to fulfill their responsibilities under the order (and the acquiring fund transmits to the ETF a list of certain of its affiliates and underwriting affiliates) and the acquiring fund and ETF maintain and preserve a copy of the exemptive order, participation agreement, and the list of affiliates with any updated information for the duration of the investment and for at least six years thereafter, the first two years in an easily accessible place. See, *e.g.*, Healthshares(tm), Inc. and XShares Order, *supra* note 205.

[209] *See supra* note 208.

[210] *See infra* Section IV.B.

[211] Acquiring funds also have indicated to the staff that it is burdensome for them to enter into participation agreements with each ETF in which the funds want to invest.

concerns underlying section 12(d)(1) in a manner that is more suited to fund investments in ETFs.[212]

B. Proposed Rule 12d1–4 Conditions

Today, we are proposing a new rule 12d1–4, which would provide an exemption to permit acquiring funds to invest in ETFs in excess of the limits of section 12(d)(1), subject to four conditions that are designed to address the historical abuses that result from pyramiding and the threat of large-scale redemptions and may arise in connection with investments in ETFs.[213] The relief we propose is subject to fewer conditions than our exemptive orders but, unlike our orders, would limit an acquiring fund's ability to redeem ETF shares.[214]

1. Control

In order to address the concern that a fund could exert control over another fund, the proposed rule would limit the exemption to an acquiring fund (and any entity in a control relationship with the acquiring fund) that does not ''control'' an ETF.[215] The Act defines ''control'' to mean ''the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.''[216] The Act also creates rebuttable presumptions that any person who directly or indirectly beneficially owns more than 25 percent of the voting securities of a company controls the company and that one who does not own that amount does not control it.[217] The effect of the proposed rule, if adopted, would be that an acquiring fund's beneficial ownership of up to 25 percent of the voting securities of an ETF, *by itself*, would not constitute control over the ETF. As a result, a fund relying on the rule could make a substantial investment in an ETF (*i.e.*, up to 25 percent of the ETF's shares) without seeking further exemption from us.

If, however, an acquiring fund uses its ownership interest in the ETF (even if that interest is 25 percent or less) to exercise a controlling influence over the ETF's management or policies, the fund would not be able to rely on the proposed rule.[218] For example, an acquiring fund that used its share position to persuade an ETF manager to enter into a transaction with an affiliate of the acquiring fund or its adviser would almost certainly exercise a controlling influence on the ETF's management and thus lose its exemption under the proposed rule.[219]

We request comment on the proposed condition. Do ETF sponsors believe that it would sufficiently protect the ETF from the type of coercive behavior on the part of acquiring funds that section 12(d)(1) was intended to prevent?

2. Redemptions

The proposed rule includes two provisions that would prevent an acquiring fund from redeeming shares it acquired in reliance on the proposed rule. First, the rule would prohibit an acquiring fund that relies on the proposed rule to acquire shares in excess of section 12(d)(1)(A)(i) limits (*i.e.*, to acquire more than three percent of an ETF's shares) from redeeming those shares.[220] As a result, acquiring funds would not be able to threaten large-scale redemptions as a means of coercing an ETF. It is our understanding that most acquiring funds purchase and sell ETF shares in secondary market transactions. Accordingly, this condition, while precluding one of the historical abuses associated with fund of funds arrangements, would not prevent acquiring funds from taking passive shareholder positions in ETF shares (in excess of section 12(d)(1) limits) in order to, for example, gain exposure to a particular market segment.

We request comment on whether the condition achieves this purpose. If not, are there other conditions that would better address the concern?

Second, the proposed rule would prohibit an ETF, its principal

[212] Many funds also appear to consider investments in ETFs to be different than investments in other investment companies. In 2004, our staff conducted examinations of a number of mutual fund complexes, which focused on the funds' investments in ETFs and whether those investments were made in accordance with section 12(d)(1) of the Act. Most of the examined mutual fund complexes treated ETF investments like investments in traditional equity securities and did not identify ETFs as registered funds subject to the requirements of section 12(d)(1) of the Act. Thus, those that acquired more than three percent of the voting securities of an ETF or invested more than five percent of the acquiring fund's assets in the voting securities of an ETF were inconsistent with section 12(d)(1). Most of the mutual funds examined invested in ETFs in order to: (i) Hedge the portfolio; (ii) ''equitize'' cash balances in order to earn returns in excess of money market rates; and (iii) gain exposure to a specific market and/or industry sector in an efficient manner.

[213] We are also proposing related amendments to rule 12d1–2 under the Act to include within its exemptive relief investments in ETFs made in reliance on proposed rule 12d1–4 and investments in non-security assets. *See infra* Section V.

[214] In 1996, Congress added section 12(d)(1)(J) to the Act, which gave us specific authority to exempt any person, security or transaction, or any class or classes of transactions, from section 12(d)(1) of the Act if the exemption is consistent with the public interest and the protection of investors. NSMIA, section 202(4) (codified at 15 U.S.C. 80a–12(d)(1)(J)). The House Report accompanying the legislation urged the Commission to use the additional exemptive authority under section 12(d)(1)(J) ''in a progressive way as the fund of funds concept continues to evolve over time.'' H.R. Rep. No. 622, *supra* note 200, at 43–44 (1996). The House Report explained that, in exercising its exemptive authority, the Commission should consider factors that relate to the protection of investors, including the extent to which a proposed arrangement is subject to conditions that are designed to address conflicts of interest and overreaching by a participant in the arrangement, so as to avoid the abuses that gave rise to the initial adoption of the Act's restrictions against funds investing in other funds. *Id.* at 44.

[215] Proposed rule 12d1–4(a)(1). The condition would provide that: (i) an acquiring fund and any of its investment advisers or depositors, and any company in a control relationship with the acquiring fund or any of its investment advisers or depositors, each individually or in the aggregate, do not control an ETF; and (ii) if, as a result of a decrease in the outstanding voting securities of an ETF, the acquiring fund, any of its investment advisers, and any company in a control relationship with the acquiring fund or its investment adviser, either individually or together in the aggregate, become holders of more than 25 percent of the outstanding voting securities of an ETF (*i.e.*, are presumed to control the ETF, *see infra* notes 217–218 and accompanying text), each of those shareholders must vote its shares of the ETF in the same proportion as the vote of all the other ETF shareholders. The same condition is in our exemptive orders.

[216] 15 U.S.C. 80a–2(a)(9).

[217] *Id.* These presumptions continue until the Commission makes a final determination to the contrary by order either on its own motion or on application by an interested person. *Id.*

[218] A determination of control depends on the facts and circumstances of the particular situation. ''[N]o person may rely on the presumption that less than 25 percent ownership is not control when, in fact, a control relationship exists under all the facts and circumstances.'' Exemption of Transactions by Investment Companies with Certain Affiliated Persons, Investment Company Act Release No. 10698 (May 16, 1979) [44 FR 29908 (May 23, 1979)] at n.2. (citing Fundamental Investors, Inc., 41 SEC 285 (1962)) (''Fundamental Investors'') (Commission order noting that rebutting presumption of control can have retrospective as well as prospective effect).

[219] We have long held that ''controlling influence'' includes, in addition to voting power, a dominating persuasiveness of one or more persons, the act or process that is effective in checking or directing action or exercising restraint or preventing free action, and the latent existence of power to exert a controlling influence. *See, e.g.*, Investors Mutual, Inc., Investment Company Act Release No. 4595 (May 11, 1966) at text accompanying nn.11–14 (*citing* The Chicago Corporation, Investment Company Act Release No. 1203 (Aug. 24, 1948); Transit Investment Corporation, Investment Company Act Release No. 927 (July 31, 1946); In the Matter of the M.A. Hanna Company, Investment Company Act Release No. 265 (Nov. 26, 1941)).

[220] Proposed rule 12d1–4(a)(2). Under the proposed rule, an acquiring fund would be deemed to have redeemed or sold the most recently acquired ETF shares first. *Id.* As a result, an acquiring fund could redeem shares from an ETF only when the fund (and companies or funds it controls) holds ETF shares in an amount consistent with section 12(d)(1)(A)(i) limits. An acquiring fund that relies on the proposed rule to invest more than five percent of its assets in the acquired ETF (prohibited by section 12(d)(1)(A)(ii)) and/or to invest more than 10 percent of its assets in all funds (including the acquired ETF) (prohibited by section 12(d)(1)(A)(iii)) but that does not acquire more than three percent of the acquired ETF's outstanding securities would not be prohibited from redeeming shares of the ETF under the proposed rule.

underwriter, and a broker or a dealer that relies on the rule to sell ETF shares in excess of section 12(d)(1)(B) limits from redeeming (or submitting an order to redeem) those shares acquired by another fund that exceed the three percent limit in section 12(d)(1)(A)(i).[221] We recognize that it may be difficult in all circumstances for an ETF, its principal underwriter, a broker or a dealer to know whether a redemption order is submitted by an acquiring fund that acquired more than three percent of the ETF's shares in reliance on the proposed rule. Accordingly, we are proposing to include a safe harbor for each of those entities if it has: (i) Received a representation from the acquiring fund that none of the ETF's shares the acquiring fund is redeeming includes any shares that it acquired in excess of three percent of the ETF's shares in reliance on proposed rule 12d1–4(a); and (ii) no reason to believe that the acquiring fund is redeeming ETF shares that the acquiring fund acquired in excess of three percent of the ETF's shares in reliance on the proposed rule.[222] If an acquiring fund attempts to redeem ETF shares in connection with a threat to coerce the ETF, the ETF would know of the attempt. In those circumstances, or if the principal underwriter, broker or dealer knows or has reason to know of the threat, the entity could not redeem (or submit for redemption) the ETF shares held by the acquiring fund. We believe that the proposed condition prohibiting acquiring funds from redeeming ETF shares acquired in reliance on the proposed rule should sufficiently prevent an acquiring fund from threatening redemptions as a means of coercing an ETF adviser.

We request comment on these conditions. Do most funds that invest in ETFs redeem their shares or sell them in secondary market transactions? Would the prohibition on redemption impede the ability of acquiring funds to dispose of ETF shares? Do acquiring funds realize significant benefits from the ability to redeem ETF shares?

The proposed conditions limiting redemptions of ETF shares are designed to eliminate the threat of redemption that an acquiring fund could otherwise use to coerce an ETF. Accordingly, the proposed rule does not include the conditions in our exemptive orders that require the ETF [223] and the acquiring fund to take measures to prevent the acquiring fund from unduly influencing the ETF.[224]

We request comment on the exclusion of these conditions from the proposed rule. Is there a concern that if the acquiring fund and ETF do not take particular measures to prevent the acquiring fund from unduly influencing the ETF, acquiring funds may be able more easily to coerce the ETF? Notwithstanding the prohibition on control and redemption, should we be concerned about particular transactions between an acquiring fund (or an acquiring fund affiliate) and an ETF, or an ETF's purchase of securities during an underwriting in which a principal underwriter is an affiliate of the acquiring fund or its adviser? If there is reason for concern about ETF purchases of securities in an affiliated underwriting, is that concern limited to purchases from an affiliate of the acquiring fund or its adviser? Should any specific conditions in the exemptive orders be included in the proposed rule in addition to or in place of the proposed conditions to prevent an acquiring fund or an acquiring fund affiliate from unduly influencing an ETF?

3. Complex Structures

To prevent the formation of overly complex multi-tiered fund structures, the proposed rule would prohibit an acquired ETF from itself being a fund of funds (*i.e.*, the rule would prohibit a fund of funds of funds, or three-tier fund, structure).[225] A fund of ETFs has

[221] Proposed rule 12d1–4(b)(1). Under the proposed rule, an exchange-traded fund, any principal underwriter thereof, and a broker or a dealer may sell or otherwise dispose of exchange-traded fund shares if the exchange-traded fund does not redeem, or the principal underwriter, broker or dealer does not submit for redemption any of the exchange-traded fund's shares that were acquired by an acquiring fund in excess of the limits of section 12(d)(1)(A)(i) in reliance on proposed rule 12d1–4(a). *Id.* An acquiring fund would be deemed to have redeemed or sold the most recently acquired exchange-traded fund shares first. *Id. See also supra* note 220.

We note that our adoption of proposed rule 12d1–4 would not preclude an acquiring fund from continuing to rely on exemptive orders we have previously issued that permit funds to invest in ETFs in excess of the limits of section 12(d)(1) but which do not restrict their ability to redeem ETF shares, subject to the conditions set forth in the orders and described above. Moreover, we intend to continue to issue such orders and may consider their codification in a rule in the future.

[222] Proposed rule 12d1–4(b)(2).

[223] The orders require that: (i) The board of directors of an ETF, including a majority of its independent directors, determines that any consideration paid by the ETF to the acquiring fund or any investment adviser, depositor, or principal underwriter of the acquiring fund and any person controlling, controlled by, or under common control with an investment adviser, depositor, or principal underwriter of the acquiring fund, (but not including any investment adviser of the ETF or any person controlling, controlled by, or under common control with the investment adviser of the ETF) (''acquiring fund affiliate'') in connection with any services or transactions: (a) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the ETF; (b) is within the range of consideration that the ETF would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned; (ii) the ETF board of directors, including a majority of the independent directors, adopts procedures reasonably designed to monitor any purchases of securities by the ETF in an underwriting in which a principal underwriter is an officer, director, member of an advisory board, acquiring fund investment adviser, acquiring fund depositor, or an acquiring fund employee or an affiliated person of any such person (''affiliated underwriting''), and the board reviews these purchases at least annually to determine whether the purchases were influenced by the acquiring fund's investment in the ETF; and (iii) the ETF maintains and preserves a copy of the procedures designed to monitor purchases made in an affiliated underwriting and maintains a written record of each purchase of securities in an affiliated underwriting and the information or materials upon which the board's determinations were made. *See supra* note 205.

[224] The orders require that: (i) Neither the acquiring fund nor any acquiring fund affiliate cause any existing or potential investment by the acquiring fund in an ETF to influence the terms of any services or transactions between the acquiring fund or an acquiring fund affiliate and the ETF (or certain affiliates of the ETF); (ii) neither the acquiring fund nor an acquiring fund affiliate causes the ETF to purchase a security in any affiliated underwriting; and (iii) the acquiring fund board of directors, including a majority of its independent directors, adopts procedures reasonably designed to assure that the acquiring fund's investment adviser(s) is conducting the acquiring fund's investment program without taking into account any consideration received by the acquiring fund or an acquiring fund affiliate from the ETF (or certain affiliates of the ETF). *See supra* note 205.

As discussed above, the proposed rule would however include the condition from our exemptive orders that an acquiring fund (and any entity in a control relationship with the acquiring fund) could not ''control'' the ETF. *See supra* note 215 and accompanying text.

[225] Proposed rule 12d1–4(a)(4) (''The exchange-traded fund has a disclosed policy that prohibits it from investing more than 10 percent of its assets in: (i) Other investment companies in reliance on section 12(d)(1)(F) or section 12(d)(1)(G) of the Act or [rule 12d1–4]; and (ii) Any other company that would be an investment company under section 3(a) of the Act but for the exceptions to that definition provided in sections 3(c)(1) and 3(c)(7) of the Act (15 U.S.C. 80a–3(c)(1) and 80a–3(c)(7)).''). Section 12(d)(1)(A)(iii) of the Act limits an acquiring fund's total investment in other funds to no more than 10 percent of the acquiring fund's assets. An ETF would still be able to make limited investments in other funds, including other ETFs. This is similar to a condition in section 12(d)(1)(G) of the Act that provides an exemption from section 12(d)(1) limits for funds to invest in other funds in the same group provided, among other things, the acquired fund has a policy that it will not rely on exemptions allowing it to be a fund of funds. *See* 15 U.S.C. 80a–12(d)(1)(G)(i)(IV). The exemptive orders generally prohibit an acquired ETF from investing in other funds beyond section 12(d)(1)(A) limits. Many of the orders have provided exceptions to this general prohibition, which permit the ETF to invest in money market funds beyond the limits of section 12(d)(1)(A) either in reliance on another exemptive order allowing the ETF to do so or in reliance on rule 12d1–1. In addition, some of the orders permit the ETF to invest in another fund beyond the limits of section 12(d)(1)(A) to the extent permitted by section 12(d)(1)(E) of the Act. An acquiring fund relying on any of these

the potential to become a complicated corporate structure of the kind that concerned Congress when section 12(d)(1) was enacted.[226] If an acquiring fund invests in an ETF that in turn invests in other funds (including other ETFs), an acquiring fund shareholder could find it difficult to determine the nature and value of the holdings ultimately underlying his or her investment. The proposed rule is designed to allow an ETF the flexibility to invest in other funds in order to meet its investment objectives while preventing shareholder confusion as to the nature of their investment in an acquiring fund by limiting the extent of those ETF investments.[227]

We request comment on the proposed limits on an ETF itself being a fund of funds. Are the proposed limits on an underlying ETF's investments in other funds sufficient to prevent investor confusion? If not, what limits should the proposed rule include to prevent shareholder confusion? Should the proposed rule include the same limit (and exceptions to the limit) as in our exemptive orders? [228] Are there reasons not to restrict the ability of an acquired ETF itself to invest in other funds, including ETFs, beyond the limits of section 12(d)(1)(A)? [229] Does the fact that ETF shares trade more like a typical equity security make it less likely that investors would be confused if we were to allow an acquiring fund to invest in an ETF that itself invests more than ten percent of its assets in other ETFs in reliance on proposed rule 12d1–4?

4. Layering of Fees

As discussed above, one of Congress' concerns regarding fund of funds arrangements was that acquiring fund shareholders might pay excessive charges due to duplicative fees at the acquiring and acquired fund levels.[230] To prevent duplicative fees at the acquiring and acquired fund levels, the proposed rule would limit sales charges and service fees charged by the acquiring fund to those set forth in the Financial Industry Regulatory Authority's (''FINRA'') sales charge rule, which takes into consideration fees charged at both levels of a fund of funds arrangement.[231] In addition, like all acquiring funds, funds that invest in ETFs would be subject to our disclosure rules for fund investments in other funds. These rules require all registered funds to disclose in their prospectus fee tables expenses paid by both the acquiring and acquired funds so that shareholders can evaluate the costs of investing in a fund that invests in other funds, including ETFs.[232] These rules and the proposed fee limit may fully address congressional concerns with the duplication and layering of fees that hide the real cost of investing in an investment company.[233]

We request comment on the proposed condition limiting the fees charged by an acquiring fund. Would the proposed fee limits adequately prevent acquiring fund shareholders from paying excessive distribution or service fees? [234] Are there any special concerns as to how to apply the proposed fee limits to an acquiring fund when a separate account invests in an acquiring fund? Do our disclosure requirements provide sufficient information to investors to allow them to determine whether the total fees imposed on a fund of ETFs are consistent with their investment objectives?

C. Scope of Proposed Rule 12d1–4

1. Acquiring Funds and ETFs Eligible for Relief

Proposed rule 12d1–4 would permit open-end and closed-end management companies (including business development companies) [235] and UITs [236] that comply with the rule's conditions to invest in ETFs beyond the

exceptions may have difficulty determining whether an acquired ETF would itself be considered a fund of funds because the acquiring fund might not be able to ascertain easily if the ETF is relying on an order, section 12(d)(1)(E) of the Act, or rule 12d1–1 to invest in other funds beyond the limits of section 12(d)(1)(A) of the Act. The orders also do not anticipate any future exemptive relief the Commission might provide to allow acquired ETFs to invest in other non-money market funds in excess of section 12(d)(1)(A) limits. Limiting exemptive relief to investments in ETFs with disclosed policies would allow an acquiring fund to determine easily if it could invest in a particular ETF.

[226] *See supra* note 198 and accompanying text.

[227] Under the proposed rule, an acquiring fund could invest in an ETF that invests up to 10 percent of its assets in other ETFs.

[228] As discussed above, the orders generally prohibit an acquired ETF from investing in other funds beyond the limits of section 12(d)(1)(A). Some of the orders include a few exceptions to this general prohibition. *See supra* note 225.

[229] The proposed rule would allow an acquired ETF to invest in other funds, including ETFs, beyond the limits of section 12(d)(1)(A) in reliance on sections 12(d)(1)(F) and 12(d)(1)(G) and to invest in other ETFs beyond the limits of section 12(d)(1)(A) in reliance on the proposed rule. However, the proposed rule would limit an acquired ETF's aggregate investment in these funds to no more than 10 percent of the acquired ETF's assets. Proposed rule 12d1–4(a)(4).

[230] *See supra* note 197 and accompanying text.

[231] Proposed rule 12d1–4(a)(3). The proposed rule would limit the sales charge (including any 12b–1 fee) or service fee charged in connection with the purchase, sale, or redemption of securities issued by the acquiring fund to the FINRA fee limits for fund of funds set forth in NASD Conduct Rule 2830(d)(3). Some ETFs charge a 12b–1 fee. *See, e.g.*, Select Sector SPDRs®, Prospectus 20,28 (Jan. 31, 2008). FINRA does not, however, apply Conduct Rule 2830 to variable annuity contracts. *See* NASD Conduct Rule 2820(a) (rule 2820 applies exclusively and in lieu of rule 2830 to the activities of members in connection with variable contracts to the extent the activities are subject to federal securities law regulation). To address the potential for excessive layering of fees in a separate account that invests in an acquiring fund, proposed rule 12d1–4(a)(3)(ii) would: (i) Prohibit an acquiring fund in which a separate account invests and any ETF in which the acquiring fund invests from charging a sales load and would allow only the acquiring fund or ETF, but not both, to impose asset-based sales charges or service fees; and (ii) require the aggregate fees associated with the variable insurance contract and the sales charges and service fees charged by the acquiring fund and the ETF to be reasonable in relation to the services rendered, the expenses expected to be incurred and, with respect to the variable insurance contract, the risks assumed by the insurance company.

[232] *See* Item 3(f) to Form N–1A; Fund of Funds Adopting Release, *supra* note 201, at Section II.D.

[233] *See supra* note 197.

[234] The proposed rule would not include the condition from our orders requiring the acquiring fund adviser (or sponsor or trustee) to waive its fee in an amount at least equal to any compensation (including fees received pursuant to any 12b–1 plan but excluding advisory fees) received from the ETF by the acquiring fund's adviser, trustee, or sponsor or an affiliated person of the acquiring fund's adviser, trustee, or sponsor in connection with the acquiring fund's investment in the ETF. The proposed rule also does not include the condition from our orders that requires the board of the acquiring fund to find that the advisory fees charged under an advisory contract are based on services provided that will be in addition to, rather than duplicative of, the services provided by an adviser to an acquired ETF. As we noted in the proposing and adopting releases for rule 12d1–1 explaining our exclusion of a similar condition from rule 12d1–1, an acquiring fund board is already obligated to protect the fund from being overcharged for services provided to the fund regardless of any special findings we might require. *See* Fund of Funds Adopting Release, *supra* note 201, nn.51–52 and accompanying text; Fund of Funds Proposing Release, *supra* note 197, at nn.65–67 and accompanying text.

[235] A business development company is any closed-end company that: (i) Is organized under the laws of, and has its principal place in, any state or states; (ii) is operated for the purpose of investing in securities described in section 55(a)(1)–(3) of the Act and makes available ''significant managerial assistance'' to the issuers of those securities, subject to certain conditions; and (iii) has elected under section 54(a) of the Act to be subject to the sections addressing activities of business development companies under the Act. *See* 15 U.S.C. 80a–2(a)(48). Section 60 of the Act extends the limits of section 12(d) to a business development company to the same extent as if it were a registered closed-end fund. Section 6(f) of the Act exempts business development companies that have made the election under section 54 of the Act from registration and other provisions of the Act. We similarly included business development companies within the scope of rule 12d1–1 to allow then to invest in money market funds beyond the limits of section 12(d)(1). *See* Fund of Funds Adopting Release, *supra* note 201, at nn.44–46 and accompanying text.

[236] Because an ETF can be organized either as an open-end management company or UIT, *see supra* note 8, it could rely on the proposed rule to invest in other ETFs beyond the limits contained in section 12(d)(1).

limits of section 12(d)(1).[237] Our orders to date have provided exemptions only for investments in ETFs by registered management funds and UITs.[238] We do not anticipate that providing a similar exemption for business development companies would raise particular concerns that section 12(d)(1) was designed to address.

We request comment on the inclusion of business development companies within the scope of proposed rule 12d1–4. Would these entities benefit from this exemption? Are there reasons not to extend the exemption to these companies? Do any special concerns arise with respect to extending the exemption to these companies?

2. Investments in Affiliated ETFs Outside the Fund Complex

In addition to providing an exemption from section 12(d)(1) of the Act, the proposed rule would provide exemptions from sections 17(a)(1), 17(a)(2), 57(a)(1) and 57(a)(2) of the Act. These provisions restrict a fund's ability to enter into transactions with affiliated persons.[239] They are designed to prevent affiliated persons from managing the fund's assets for their own benefit, rather than for the benefit of the fund's shareholders.[240] These provisions would otherwise effectively preclude a fund that acquires five percent or more of the securities of an ETF in another fund complex from making any additional purchases of shares from the ETF.[241] They also would prohibit an affiliated acquiring fund from depositing (*i.e.*, ''selling'') securities identified in the creation basket. Permitting an acquiring fund to purchase additional ETF shares from the ETF at NAV on the same basis as any other purchaser of a creation unit, by itself, seems to provide little opportunity for the acquiring fund to manage the ETF for its own benefit.[242] Allowing the ETF to acquire securities identified in a creation basket from an affiliated acquiring fund on the same basis as any other investor also would not seem to implicate the concerns underlying section 17(a). Accordingly, we believe that exemptions from sections 17(a)(1), 17(a)(2), 57(a)(1), and 57(a)(2) of the Act for these transactions would be appropriate, in the public interest, and consistent with the protection of investors and the purposes of the Act.[243]

We seek comment on these exemptions. Are there risks other than the concerns we addressed with respect to section 12(d)(1) limitations, regarding the potential that the acquiring fund could manage the ETF, that would arise from the proposed exception allowing a fund to acquire more than five percent of the shares of an affiliated ETF in another complex?

3. Use of Affiliated Broker to Effect Sales

In order to allow acquiring funds to take full advantage of the exemptive relief, proposed rule 12d1–4 also would provide limited relief from section 17(e)(2) of the Act. If an investment company in one complex acquired more than five percent of the assets of an ETF in another complex, any broker-dealer affiliated with that ETF would become a (second-tier) affiliated person of the acquiring fund.[244] As a result of the affiliation, the broker-dealer's fee for effecting the sale of securities to (or by) the acquiring fund would be subject to the conditions set forth in rule 17e–1, including the quarterly board review and recordkeeping requirements with respect to certain securities transactions involving the affiliated broker-dealer.[245]

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[237] Section 12(d)(1)(B)'s limits on sales of an acquired fund's securities apply only to shares of an ETF organized as an open-end investment company.

[238] We have not had the opportunity to consider a request for an individual exemptive order for other types of investment companies. Our orders also have permitted funds to invest in ETFs organized as UITs (and as open-end funds). Proposed rule 12d1–4 would include relief for investments in ETFs that are organized as UITs as long as the UITs satisfy the criteria enumerated in proposed rule 6c–11(e)(4). Proposed rule 12d1–4(d)(2). As noted above, proposed rule 6c–11 would not include a UIT within its relief because we have not received an exemptive application for a new ETF to be organized as a UIT in a number of years. *See supra* note 65 and accompanying text.

[239] Section 17 of the Act limits transactions between a fund and its affiliated persons. Section 17(a) of the Act generally prohibits affiliated persons of a registered fund (''first-tier affiliates'') or affiliated persons of the fund's affiliated persons (''second-tier affiliates'') from selling securities or other property to or purchasing securities or other property from the fund (or any company the fund controls). Section 57 of the Act restricts certain transactions between business development companies and certain of their affiliates. An affiliated person of a fund includes: (i) Any person directly or indirectly owning, controlling, or holding with power to vote, five percent or more of the outstanding voting securities of the fund; and (ii) any person five percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the fund. *See* 15 U.S.C. 80a–2(a)(3)(A), (B). Thus, if an acquiring fund holds five percent or more of the outstanding voting shares of the ETF, the acquiring fund is an affiliated person of the ETF and the ETF is an affiliated person of the acquiring fund.

[240] *See Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. On Banking and Currency*, 76th Cong., 3d Sess. 37 (1940) (Statement of Commissioner Healy). Section 17 also would restrict an acquiring fund from investing in an ETF that is affiliated with the acquiring fund because both funds have a common investment adviser or other person exercising a controlling influence over the management or policies of the funds. *See* 15 U.S.C. 80a–2(a)(3)(C). The determination of whether a fund is under the control of its adviser, officers, or directors depends on all the relevant facts and circumstances. *See* Investment Company Mergers, Investment Company Act Release No. 25259 (Nov. 8, 2001) [66 FR 57602 (Nov. 15, 2001)], at n.11. For purposes of this release, we presume that funds with a common investment adviser are under common control because funds that are not affiliated persons would not require, and thus not rely on, the exemptions from section 17(a). Although funds in the same group of investment companies generally are under common control of an investment adviser or other person exercising a controlling interest, these funds may rely on section 12d(1)(G) of the Act to invest in an ETF in the same group. *See infra* note 249 and accompanying text.

[241] An ETF would be prohibited under section 17(a)(1) from selling its shares to an affiliated acquiring fund and under section 17(a)(2) from purchasing securities (*i.e.*, securities designated in the creation basket) from the affiliated acquiring fund in exchange for ETF shares. An acquiring fund would be prohibited under section 17(a)(1) from selling any securities (*i.e.*, securities identified in the creation basket) to an affiliated ETF in exchange for the ETF's shares. An acquiring fund also would be prohibited under section 17(a)(2) from purchasing (creation basket) securities from an affiliated ETF for the redemption of ETF shares. The ETF would be prohibited under section 17(a)(1) from selling the affiliated acquiring fund (creation basket) securities in exchange for ETF shares redeemed and under section 17(a)(2) from acquiring the ETF shares submitted for redemption by the affiliated acquiring fund

[242] The exemptive orders provide similar relief from sections 17(a)(1) and 17(a)(2) of the Act, including relief to allow the acquiring fund to redeem shares of an affiliated ETF. The proposed rule would not, however, provide an acquiring fund relief from sections 17(a)(2) and 57(a)(2) of the Act in order to redeem shares in excess of the three percent limit in section 12(d)(1)(A)(i) from an affiliated ETF. In addition, proposed rule 6c–11, which would permit persons affiliated with an ETF solely because they own five percent or more of the ETF's shares, to purchase and sell ETF shares in-kind (*i.e.*, in exchange for securities designated in the creation basket) would not extend relief to certain redemptions by acquiring funds consistent with proposed rule 12d1–4(a). *See supra* Section III.C.3 and proposed rule 6c–11(d). As noted above, no orders have been issued to business development companies therefore no order includes relief from sections 57(a)(1) and 57(a)(2) of the Act. *See supra* note 238 and accompanying text.

[243] Our proposal would not provide an exemption for any transactions other than the sale of securities by an acquiring fund to an affiliated ETF for a creation unit of ETF shares. The proposed rule also would not provide an exemption for any other transactions between a business development company and an affiliated ETF that would be subject to section 57 limitations.

[244] *See supra* notes 239–240.

[245] Section 17(e)(2) of the Act prohibits an affiliated person (or second-tier affiliate) of a fund from receiving compensation for acting as a broker, in connection with the sale of securities to or by the fund if the compensation exceeds limits prescribed by the section. Rule 17e–1 sets forth a conditional exemption under which a commission, fee or other remuneration shall be deemed as not exceeding the ''usual and customary broker's commission'' for purposes of section 17(e)(2)(A) of the Act. Rule 17e–1(b)(3) requires the fund's board of directors, including a majority of the directors who are not interested persons under section 2(a)(19) of the Act, to determine at least quarterly that all transactions effected in reliance on the rule have complied with procedures which are reasonably designed to provide that the brokerage compensation is consistent with the rule's standards. Rule 17e–1(d)(2) specifies the records

We believe that it is unlikely that a broker-dealer would be in a position to take advantage of the acquiring fund merely because that fund owned a position in an ETF affiliated with the broker-dealer.[246] Accordingly, the proposed rule would permit an acquiring fund to pay commissions, fees, or other remuneration to a (second-tier) affiliated broker-dealer without complying with the quarterly board review and recordkeeping requirements set forth in rules 17e–1(b)(3) and 17e–1(d)(2).[247] This relief would be available only if the broker-dealer and the acquiring fund are affiliated solely because of the acquiring fund's investment in the ETF.

We request comment on the proposed exemptions. Is the scope of the proposed exemptions from section 17 limitations sufficiently broad to allow funds to take full advantage of the proposed relief? Are the proposed exemptions from board review and recordkeeping requirements with respect to transactions with an affiliated broker-dealer necessary? Do funds engage in these transactions with broker-dealer affiliates of acquired ETFs? Is there additional section 17 relief that would be helpful in order for acquiring funds to take full advantage of the proposed exemption for investments in ETFs? If so, please be specific regarding the transactions that would prevent funds from relying on the proposed rule.

V. Exemption for Affiliated Fund of Funds Investments

A. Affiliated Fund of Funds Investments in ETFs

As noted above, Congress recognized that the investment limits in section 12(d)(1) might restrict certain legitimate fund of funds arrangements, and included three exceptions to those limits.[248] One of these exceptions—section 12(d)(1)(G)—permits a registered open-end investment company or UIT to invest in other registered open-end investment companies or UITs (including ETFs) that are in the ''same group of investment companies'' (''affiliated funds'') beyond the section 12(d)(1) limits.[249] A fund that invests in unaffiliated ETFs (*i.e.*, ETFs in other fund groups) in many cases, however, is still subject to the section 12(d)(1) limits.[250] Section 12(d)(1)(G) restricts the other investments an acquiring fund investing in affiliated funds can make to government securities and short-term paper.[251]

When it added section 12(d)(1)(G) to the Act, Congress also gave us specific authority to provide certain exemptions from the limitations of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.[252] In conjunction with the adoption of rule 12d1–1 in 2006 (allowing funds to invest in money market funds beyond the limits of section 12(d)(1)), we adopted rule 12d1–2, which allows funds relying on section 12(d)(1)(G) also to invest in: (i) Unaffiliated money market funds when the acquisition is in reliance on rule 12d1–1; (ii) securities issued by unaffiliated funds (including ETFs), subject to the investment limits in sections 12(d)(1)(A) and 12(d)(1)(F) of the Act; [253] and (iii) securities not issued by an investment company. Under rule 12d1–2, therefore, a fund that invests in affiliated funds in reliance on section 12(d)(1)(G) and desires to invest in unaffiliated ETFs is subject to these statutory limitations (*e.g.*, to acquiring no more than three percent of the acquired ETF's shares). There seems no reason, however, to maintain the statutory limitations on investments in ETFs in these circumstances when we are proposing to permit other types of funds to invest in ETFs in excess of section 12(d)(1) limits. No special issues appear to arise in connection with an acquiring fund's investments in an unaffiliated ETF simply because the acquiring fund also invests in affiliated funds. Accordingly, we propose to amend rule 12d1–2 to allow acquiring funds that invest in affiliated funds in reliance on section 12(d)(1)(G) to invest in unaffiliated ETFs beyond the statutory limitations as long as the funds comply with the conditions of proposed rule 12d1–4.[254] This is similar to the relief we provided to affiliated funds of funds to allow them to acquire shares in money market funds, if the acquisition is in reliance on rule 12d1–1.[255]

We request comment on the proposed amendment. Are there reasons not to extend the proposed relief to affiliated funds of funds? Do investments by an acquiring fund that invests in affiliated funds raise any special concerns if the acquiring fund also invests in unaffiliated ETFs? Are these concerns different than any other fund's investment in unaffiliated ETFs?

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that must be maintained by each fund with respect to any transaction effected pursuant to rule 17e–1.

[246] We expect that the ETF's adviser would have no influence over the decisions made by the acquiring fund's adviser. In addition, because the interests of the adviser to the ETF and the adviser to the acquiring fund are directly aligned with their respective funds, transactions between the acquiring fund and a broker-dealer affiliate of the ETF are likely to be at arm's length.

[247] Proposed rule 12d1–4(c). The proposed relief is similar to relief we have provided in rule 12d1–1, which permits funds to invest in money market funds in excess of section 12(d)(1) limits. *See* Fund of Funds Adopting Release, *supra* note 201, at nn.32–36 and accompanying text. An acquiring fund relying on this exemption would be required to comply with all of the provisions of rule 17e–1, except for those in paragraphs (b)(3) and (d)(2). It does not appear that having to comply with the other provisions contained in rule 17e–1 would deter acquiring funds from taking full advantage of the exemption provided by proposed rule 12d1–4.

[248] For a full discussion of section 12(d)(1) limitations and the exceptions under sections 12(d)(1)(E), 12(d)(1)(F), and 12(d)(1)(G) of the Act, *see* Fund of Funds Proposing Release, *supra* note 197, at Section I.

[249] *See* 15 U.S.C. 80a–12(d)(1)(G). Section 12(d)(1)(G)(ii) of the Act defines ''same group of investment companies'' to mean ''any 2 or more registered investment companies that hold themselves out to investors as related companies for purposes of investment and investor services.'' Section 12(d)(1)(G) imposes the following conditions on funds relying on this exception: (i) other investments are limited to short-term paper and government securities; (ii) acquired funds must have a policy against investing in shares of other funds in reliance on sections 12(d)(1)(F) or 12(d)(1)(G) (to prevent multi-tiered structures); and (iii) overall distribution expenses are limited.

[250] A fund could invest in unaffiliated funds in reliance on two other statutory exemptions. Under section 12(d)(1)(E) an investment company may acquire securities issued by another investment company provided that (i) the acquiring fund's depositor or principal underwriter is a broker or dealer registered under the Securities Exchange Act of 1934, (or a person the broker-dealer controls), (ii) the security is the only investment security the acquiring fund holds (or the securities are the only investment securities the acquiring investment company holds if it is a registered UIT that issues two or more classes or series of securities, each of which provides for the accumulation of shares of a different investment company), and (iii) the acquiring investment company is obligated (a) to seek instructions from its shareholders with regard to voting the acquired investment company's securities or to vote the acquired investment company's shares in the same proportion as the vote of all other acquired investment company shareholders, and (b) if unregistered, to obtain Commission approval before substituting the investment security. A fund relying on section 12(d)(1)(F) of the Act (and its affiliated persons) may acquire no more than three percent of another investment company's outstanding stock, cannot charge a sales load greater than 1½ percent; is restricted in its ability to redeem shares of the acquired investment company; and must vote shares of an acquired investment company either by seeking instructions from the acquiring fund's shareholders, or voting the shares in the same proportion as the vote of all other shareholders of the acquired investment company.

[251] Congress imposed this limitation to restrict the use of the exemption provided by section 12(d)(1)(G) to a ''bona fide'' fund of funds. Congress permitted other investments to include only government securities and short-term paper, which provide the fund with a source of liquidity to redeem shares. *See* H.R. Rep. No. 622, *supra* note 200, at 42.

[252] Section 12(d)(1)(J) of the Act authorizes the Commission to exempt any person, security or transaction, or any class or classes of transactions, from section 12(d)(1) of the Act if the exemption is consistent with the public interest and the protection of investors. *See supra* note 214.

[253] *See supra* note 250.

[254] Proposed rule 12d1–2(a)(4).

[255] *See* 17 CFR 270.12d1–2(a)(3).

B. Affiliated Fund of Funds Investments in Other Assets

We also are proposing an amendment to rule 12d1–2 that would allow funds relying on section 12(d)(1)(G) to invest in assets other than securities. As discussed above, in 2006 we adopted rule 12d1–2 to permit affiliated funds of funds to acquire securities issued by other unaffiliated investment companies, as well as ''securities (other than securities issued by an investment company).'' [256] The rule was intended to allow an acquiring fund greater flexibility to meet investment objectives that may not be met as well by investments in affiliated funds. We noted that these investments would not seem to present any additional concerns that section 12(d)(1)(G) was intended to address.[257]

Since we adopted the rule, it has been brought to our attention that funds relying on section 12(d)(1)(G) wish to invest in other types of financial assets, including futures and other financial instruments that might not be securities under the Act and thus may not be within the scope of rule 12d1–2.[258] Investments in these types of assets may allow an acquiring fund greater flexibility to meet investment objectives that may not be met as well by investments in securities. In addition, like investments in securities, investments in these assets do not appear to raise concerns that the investment limits on fund of funds arrangements contained in section 12(d)(1) were intended to address. Accordingly, we propose to amend rule 12d1–2 to allow funds relying on section 12(d)(1)(G) to invest in assets or instruments other than securities.[259] Under the proposed rule, funds relying on the exemptive relief in section 12(d)(1)(G) would be able to invest in, among other things, real estate, futures contracts, and other financial instruments that do not qualify as a security under the Act.[260] Those investments would, of course, have to be consistent with the fund's investment policies.[261]

We seek comment on this proposal. Would any concerns arise if a fund relying on section 12(d)(1)(G) could invest directly in non-securities? Do these concerns differ from a traditional fund that can invest in such assets and invests in other funds subject to the limits of section 12(d)(1)?

VI. Request for Comment

The Commission requests comment on the rules, rule amendments, and Form N–1A amendments proposed in this release. The Commission also requests suggestions for additional changes to existing rules or forms, and comments on other matters that might have an effect on the proposals contained in this release. Commenters are requested to provide empirical data to support their views.

VII. Paperwork Reduction Act

Certain provisions of proposed rule 6c–11 would result in new ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[262] The Commission is therefore submitting this proposal to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for the collection of information requirements is ''Rule 6c–11 under the Investment Company Act of 1940, 'Exchange-traded funds.' '' If adopted, this collection would not be mandatory, but would be necessary for ETFs that seek to form and operate as open-end management companies without seeking individual exemptive orders. Responses to the collection of information requirements of proposed rule 6c–11 would not be kept confidential.

In addition, the Commission is proposing amendments to an existing collection of information requirement titled ''Form N–1A under the Investment Company Act of 1940 and Securities Act of 1933, Registration Statement for Open-End Management Companies.'' Compliance with the disclosure requirements of Form N–1A is mandatory. Responses to the disclosure requirements are not kept confidential.

Finally, proposed rule 12d1–4 would result in a new ''collection of information'' requirement within the meaning of the PRA. The Commission is therefore submitting the proposal for rule 12d1–4 to OMB for review. The title for the collection of information requirements is ''Rule 12d1–4 under the Investment Company Act of 1940, 'Exemption for investments in exchange-traded funds.' '' If adopted, this collection would not be mandatory, but would be a condition that an acquiring fund would have to satisfy in order for an ETF, its principal underwriter, a broker, or a dealer to rely on the safe harbor if an acquiring fund redeems ETF shares. Responses to the collection of information requirements of proposed rule 12d1–4 would not be kept confidential.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. OMB has not yet assigned control numbers to the new collections for proposed rules 6c–11 and 12d1–4. The approved collection of information associated with Form N–1A, which would be revised by the proposed amendments, displays control number 3235–0307.

A. Proposed Rule 6c–11

Proposed rule 6c7–11 would exempt ETFs from certain provisions of the Act, permitting them to begin operating without obtaining an exemptive order from the Commission. The proposed rule also would expand the relief we have issued in the past to index-based ETFs, and to transparent, actively managed ETFs. Each ETF seeking to rely on the proposed rule would have to disclose on a daily basis specific information to market participants: (i) The contents of its basket assets; (ii) the identities and weightings of the component securities and other assets in its portfolio if it does not track an index whose provider discloses its composition daily; and (iii) the prior business day's NAV, market closing price for its ETF shares and premium/discount information.[263] In addition, each ETF would have to disclose in its registration statement: (i) the number of shares that comprise a creation unit; and (ii) the foreign holidays that would prevent timely satisfaction of redemption with respect to foreign securities in its basket assets.[264] An ETF

[256] *See* 17 CFR 270.12d1–2(a)(1), 17 CFR 270.12d1–2(a)(2).

[257] *See* Fund of Funds Proposing Release, supra note 197, at n.80 and accompanying text.

[258] *See* 15 U.S.C. 80a–2(a)(36) (defining ''security''). If a future or other financial instrument in which a fund relying on section 12(d)(1)(G) proposes to invest is included within the Act's definition of ''security,'' investments in such an instrument would be permitted under current rule 12d1–2(a)(2).

[259] Proposed rule 12d1–2(a)(5).

[260] We have issued exemptive orders to funds that rely on section 12(d)(1)(G) to allow those funds to invest in futures contracts and other financial instruments. *See, e.g.*, Schroder Series Trust, *et al.*, Investment Company Act Release Nos. 28133 (Jan. 24, 2008) [73 FR 5603 (Jan. 30, 2008)] (notice) and 28167 (Feb. 25, 2008) (order); The UBS Funds, *et al.*, Investment Company Act Release Nos. 28080 (Dec. 19, 2007) [72 FR 74372 (Dec. 31, 2007)] (notice) and 28122 (Jan. 16, 2008) (order); Vanguard Star Funds, *et al.*, Investment Company Act Release Nos. 28009 (Sept. 28, 2007) [72 FR 56813 (Oct. 4, 2007)] (notice) and 28024 (Oct. 24, 2007) (order) (permitting funds relying on section 12(d)(1)(G) and rule 12d1–2 under the Act to invest in financial instruments that may not be securities within the meaning of section 2(a)(36) of the Act).

[261] *See* Item 4 of Form N–1A (requiring disclosure of funds' investment objectives and principal investment strategies).

[262] 44 U.S.C. 3501–3520.

[263] 263 Proposed rule 6c–11.

[264] 264 *Id.*

that chooses not to disclose its portfolio would have to track an index whose provider discloses the identities and weightings of the securities and other assets that constitute the index in order to rely on the proposed rule. In addition, each ETF seeking to rely on the proposed rule also would have to, in any sales literature (as defined in the rule), identify itself as an ETF, which does not sell or redeem individual shares, and explain that investors may purchase or sell individual shares on national securities exchanges.

Two of the disclosure conditions in proposed rule 6c–11 would not result in a burden for purposes of the PRA. Disclosure of the contents of the basket assets that comprise a creation unit and the number of shares in each creation unit does not result in a burden because ETFs must disclose this information in the normal course of business.[265] Similarly, disclosure by an index provider of the identities and weightings of the component securities and other assets that comprise the index would not result in a burden because index providers disclose this information in the normal course of business.

The remaining four disclosure requirements are collections of information. First, the proposed rule would require an ETF that does not track an index whose provider discloses its composition daily to provide daily disclosure of the identities and weightings of the component securities and other assets in the ETF's portfolio. Currently, two ETF registrants are required to disclose their portfolios daily under the terms of their exemptive orders.[266] The Commission staff estimates that an ETF each year would spend approximately 200 hours of professional time to update the relevant Internet Web page daily with this information, at a cost of $42,000.[267] The staff also estimates that each new ETF initially would spend 100 hours to develop the Web page for this disclosure. Staff estimates the initial cost would be $22,520 for internal ETF staff time to develop the Web page and $12,600 for an external Web site developer, for a total of $35,120.[268]

We seek comments on these estimates. If commenters believe these estimates are not reasonable, we request they provide data that would allow us to make more accurate estimates.

Second, the proposed rule also would require each ETF to disclose its prior business day's NAV, market price for its shares, and premium/discount information, which would provide investors with information on the deviation, if any, between the price of ETF shares and the NAV of the underlying portfolio. Commission staff estimates that an ETF each year spends approximately 206 hours of professional time to update the relevant Internet Web page daily with this information. Based on staff estimates, we estimate the annual cost would be $43,466 for internal ETF staff time to update the Web page and $6,000 to acquire the data from external data providers.[269] The staff also estimates that each new ETF initially would spend 75 hours to develop the Web page for these disclosures. Based on staff estimates, we estimate the initial cost would be $16,890 for internal ETF staff time to develop the Web page and $9,540 for an external Web site developer, for a total of $26,430.[270]

We seek comments on these estimates. If commenters believe these estimates are not reasonable, we request they provide data that would allow us to make more accurate estimates.

Third, in any sales literature each ETF must identify itself as an ETF that does not sell or redeem individual shares, and explain that investors may purchase or sell individual shares only on national securities exchanges. This condition is similar to the condition in our exemptive orders, which requires each ETF to agree not to market or advertise the ETF as an open-end fund or mutual fund and to explain that the ETF shares are not individually redeemable. Based on conversations with ETF representatives, Commission staff estimates that an ETF each year spends approximately 30 hours at a cost of $1704 to comply with the condition in our exemptive orders.[271] Because the condition in the proposed rule is similar, the staff estimates that each new ETF also would spend 30 hours at a cost of $1704 to comply with the condition in the proposed rule.

We seek comment on this estimate. If commenters believe this estimate is not reasonable, we request they provide data that would allow us to make a more accurate estimate.

Finally, some ETFs that track foreign indexes have stated that local market delivery cycles for transferring foreign securities to redeeming investors, together with local market holiday schedules, require a delivery process in excess of the statutory seven days required by section 22(e) of the Act. The proposed rule would codify the disclosure requirement in existing exemptive orders that requires ETFs to disclose in their registration statements the foreign holidays that would prevent timely satisfaction of redemption.[272] The collection of information burden for this disclosure is discussed in the PRA analysis of proposed Form N–1A amendments in section VI.B below.

As of December 2007, there were 601 ETFs.[273] The Commission staff

[265] *See* Section II of this release for a discussion on the operation of ETFs. Disclosure of the contents of the basket assets and the number of shares that comprise a creation unit are critical to investors who seek to purchase or redeem creation units from the ETF and, therefore, to the operation of an ETF. To purchase a creation unit, an investor would need to know the securities and other assets that must be deposited with the ETF in exchange for a creation unit. To redeem a creation unit, an investor would need to know the number of ETF shares that comprise a creation unit in order to compile enough shares to redeem from the ETF. Disclosure of the contents of the basket assets also is important to the arbitrage mechanism of the ETF. Arbitrageurs compare the NAV of the basket to the NAV of ETF shares to determine whether to purchase or redeem creation units based on the relative values of ETF shares in the secondary market and the securities contained in the basket.

[266] ProShares Notice, *supra* note 113; Rydex ETF Trust, Investment Company Act Release No. 27703 (Feb. 20, 2007) [72 FR 8810 (Feb. 27, 2007)]. Together, these registrants offer 64 ETFs that are required to disclose their portfolios daily.

[267] Estimates on the number of burden hours and external costs associated with the collections of information are based on informal conversations between Commission staff and representatives of ETFs. The staff estimates the cost would be 200 hours for an internal Web site developer (at $211 per hour) (200 × $211 = $42,200). Hourly wages used for purposes of this PRA analysis are from the Securities Industry Association (now named Securities Industry and Financial Markets Association), SIA Report on Management & Professional Earnings in the Securities Industry 2006, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[268] Commission staff estimates the cost would equal 80 hours for Web site developers at the ETF (at $211 per hour) to develop the Web page and 20 hours for internal Web site managers (at $282 per hour) to review the Web page ((80 hours × $211) + (20 hours time × $282) = $22,520). In addition, based on discussions with industry representatives, the staff estimates that each ETF initially would spend an additional $12,600 to external Web site developers ($22,520 + 12,600 = $35,120).

[269] Commission staff estimates the cost would equal 206 hours for internal Web site developers at ($211 per hour) (206 × $211 = $43,466).

[270] Commission staff estimates the cost would equal 60 hours for internal Web site developers (at $211 per hour) to develop the Web page and 15 hours for Web site managers (at $282 per hour) to review the Web page ((60 hours × $211) + (15 hours × $282) = $16,890). In addition, based on discussions with industry representatives, the staff estimates that each fund would spend an additional $9540 to external Web site developers ($16,890 + $9540 = $26,430).

[271] Commission staff estimates the cost would equal 2 hours for the ETF's internal counsel (at $292 per hour) to draft the disclosure and 28 hours for clerical staff (at $40 per hour) to input and copy check the marketing materials ((2 × $292) + (28 × $40) = $1704).

[272] *See supra* notes 136–141 and accompanying text for a discussion of the proposed exemption from section 22(e) of the Act.

[273] ICI ETF Statistics 2007, *supra* note 5.

estimates that each year 150 new ETFs will form and operate.[274] The staff estimates that each ETF each year would spend approximately 236 hours to comply with the conditions of proposed rule 6c–11. Each new ETF would spend an additional 75 hours to develop the Web sites for daily disclosure of its prior business day's NAV, market closing price for its shares, and premium/discount information. In addition, ETFs that provide the identities and weightings of the securities and other assets in their portfolios if they do not track an index whose provider discloses its composition daily would spend an additional 100 hours to develop the Web sites for this disclosure. Each of those ETFs also would spend an estimated 200 hours each year to update the disclosures of portfolio assets on its Web site. For purposes of this PRA, the staff estimates that one-half of all new ETFs (75 ETFs) would provide this disclosure. Based on staff estimates, we estimate that ETFs would, in the aggregate, spend 205,036 hours each year to comply with the requirements of proposed rule 6c–11.[275] We estimate further that ETFs would spend 18,750 hours initially to develop the Web page for these disclosures, amortized over three years for an annual burden of 6250 hours.[276] Thus, the estimated total annual burden is 211,286 hours.[277] We estimate the annual internal costs of ongoing compliance with these disclosure requirements would be $40 million and external costs would be $4.5 million.[278] We further estimate that initial internal costs to develop the Web page for these disclosures would be $4.2 million and external costs would be $2.3 million, or $1.4 million and $0.8 million, respectively, amortized over three years.[279]

B. Form N–1A

We are proposing amendments to Form N–1A to provide more useful information to investors who purchase and sell ETF shares on national securities exchanges.

Creation Units. The proposed amendments would permit an ETF to exclude certain information from its prospectus that is not pertinent to investors purchasing individual ETF shares. Specifically, an ETF that has creation units of 25,000 shares or more may exclude from its prospectus: (i) Information on how to purchase and redeem shares of the ETF; [280] and (ii) fee table fees and expenses for purchases and redemptions of creation units.[281] Based on conversations with industry representatives, Commission staff estimates that this proposed amendment would decrease the information collection burdens of an ETF that has creation units of 25,000 shares or more by an average of 1.4 hours per fund per filing of an initial registration statement or post-effective amendment to a registration statement.

The proposed amendment also would require disclosures designed to include important information for purchasers of individual ETF shares, as described below. An ETF would have to modify the narrative explanation preceding the example in the fee table in its prospectus and periodic reports to state that fund shares are sold on the secondary market rather than redeemed at the end of the periods indicated, and that investors in ETF shares may be required to pay brokerage commissions that are not reflected in the fee table.[282] We believe that the added information collection burdens associated with this statement, if any, would be negligible.

We request comment on these estimates. If commenters believe these estimates are not reasonable, we request they provide data that would allow us to make more accurate estimates.

Total Returns. The proposed amendments would require each ETF to include a separate line item for returns based on the market price of ETF shares in the average annual total returns table in Item 2 of the Form.[283] This would codify, with modifications, a condition in ETF exemptive orders. The amendments also would require ETFs to calculate total return at market prices in addition to returns at NAV for their financial highlights tables.[284] One consequence of this proposed amendment is that ETFs would be required to include two bar charts under Item 2 of Form N–1A; one using market price returns and one using NAV returns.[285] We do not believe these added disclosures would increase the hourly burdens of ETFs. ETFs are currently required by our orders to calculate and present market price returns in the prospectus and, therefore, this disclosure would not present a new substantive requirement. The proposal would eliminate industry practice of including this disclosure in a supplemental section rather than the main body of the prospectus and, therefore, would integrate the disclosure within current Form N–1A requirements.[286] Staff estimates that the time it takes to prepare the new line items and the additional bar chart would be the same as the amount of time ETFs currently spend preparing the market price return disclosure that is included in the supplemental section. Based on discussions with industry representatives, the staff estimates that each ETF currently spends approximately 0.6 hours of professional time to prepare the market price returns disclosure required by our exemptive orders.

We request comment on this estimate. If commenters believe the estimate is not reasonable, we request they provide specific data that would allow us to make a more accurate estimate.

Premium/Discount Information. The amendments also would require ETFs to include premium/discount information in both the prospectus and annual report of each ETF. This proposed amendment codifies an existing exemptive order requirement. Based on discussions with industry representatives, the staff estimates that each ETF currently spends an average of 0.5 hours per filing of an initial registration statement or a post-effective amendment to a registration statement to include this disclosure.[287] The staff

[274] To estimate the number of new ETFs each year for purposes of this PRA, the staff has used the approximate average of the number of new ETFs for the past three years ((50 + 153 + 244)/3 =149). ICI, *Exchange-Traded Fund Assets December 2006,* Jan. 31, 2007; ICI ETF Statistics 2007, *supra* note 5.

[275] Assuming all existing ETFs would rely on the proposed rule, these estimates are based on the following calculations: ((206 hours + 30) × 612 (existing plus estimated new index-based ETFs)) + (436 hours × 139 (existing plus estimated new actively managed ETFs) = 205,036).

[276] This estimate is based on the following calculation: (75 hours × 75 (estimated new index-based ETFs)) + (175 hours × 75 (estimated new actively managed ETFs)) = 18,750.

[277] This estimate is based on the following calculation: 205,036 + 6250 = 211,286.

[278] These estimates are based on the following calculations: (($43,466 + $1704) × 612) + ($42,000 × 139) = $39,760,670; ($6000 × 612) + ($6000 × 139) = $4,506,000.

[279] These estimates are based on the following calculations: ($16,890 × 75) + (($16,890 + $22,520) × 75) = $4,222,500; ($9540 × 75) + (($9540 + $12,600) × 75) = $2,376,000.

[280] Proposed Item 6(h)(1) of Form N–1A.

[281] Proposed Instruction 1(e)(i) to Item 3 of Form N–1A.

[282] Proposed Instruction 1(e)(ii) to Item 3 of Form N–1A; Proposed Instruction 1(e)(ii) to Item 22(d) of Form N–1A. The proposal also would require each ETF to identify the principal U.S. market on which its shares are traded and include a statement to the effect that ETF shares are bought and sold on national securities exchanges. We believe that the added information collection burdens associated with these very brief and specific statements, if any, would be negligible.

[283] Proposed Instruction 5(a) to Item 2(c)(2) of Form N 1A.

[284] Proposed Instruction 3(f) to Item 8(a) of Form N–1A.

[285] *See* Item 2(c)(2)(i) of Form N 1A.

[286] *See supra* note 163.

[287] This estimate is based on discussions with representatives of ETFs, which include premium/discount information as required by their exemptive orders.

further estimates that each ETF also would spend 0.5 hours per annual report to include this disclosure.

We request comment on this estimate. If commenters believe the estimate is not reasonable, we request they provide specific data that would allow us to make a more accurate estimate.

Foreign Holidays. As noted above, proposed rule 6c–11 would require certain ETFs to disclose in their registration statements the foreign holidays that would prevent timely satisfaction of redemption. As of July 2007, there were 125 ETFs that provide exposure to international equity markets. Based on discussions with ETF representatives, the staff estimates that approximately 10% of these ETFs may need to delay satisfaction of redemption requests, and that each of those ETFs would spend approximately 0.3 hours to include the required information in its registration statement.

We request comment on these estimates. If commenters believe these estimates are not reasonable, we request they provide specific data that would allow us to make more accurate estimates.

The current burden for preparing an initial Form N–1A filing is 830.47 hours per portfolio. The current burden for preparing a post-effective amendment on Form N–1A is 111 hours per portfolio. The total annual hour burden approved for Form N–1A is 1,575,184. Based on Commission filings, Commission staff estimates that on an annual basis, ETFs file initial registration statements covering 98 ETF portfolios, and post-effective amendments covering 1441 ETF portfolios on Form N–1A. Based on staff estimates, we estimate that the proposed amendments would not increase the hour burden per ETF per filing on an initial registration or post-effective amendment to a registration statement.[288] Therefore, if the proposed amendments to Form N–1A were adopted, we estimate that the total annual hour burden for all ETFs for preparation and filing of initial registration statements would remain the same.

We request comment on these estimates. If commenters believe these estimates are not reasonable, we request they provide specific data that would allow us to make more accurate estimates.

C. Proposed Rule 12d1–4

Proposed rule 12d1–4 would permit an acquiring fund to acquire ETF shares in excess of the limits of section 12(d)(1) of the Act, subject to certain conditions.[289] In order to rely on the proposed rule for an exemption from section 12(d)(1)(B) limits, an ETF may not redeem and its principal underwriter, a broker, or dealer may not submit for redemption any of the ETF's shares that were acquired by an acquiring fund in excess of the limits of section 12(d)(1)(A)(i) of the Act in reliance on proposed rule 12d1–4.[290] The proposed rule provides a safe harbor for these entities if the entity has (i) received a representation from the acquiring fund that none of the ETF shares it is redeeming was acquired in excess of the limits of section 12(d)(1)(A)(i) in reliance on the rule, and (ii) no reason to believe that the acquiring fund is redeeming any ETF shares that the acquiring fund acquired in excess of the limits of section 12(d)(1)(A)(i) in reliance on the rule.[291] The representation required for the safe harbor would be a collection of information for purposes of the PRA.

Our understanding is that acquiring funds that invest in ETFs generally do not redeem their shares from the ETF, but rather sell them in secondary market transactions. We also believe that an acquiring fund that would not rely on proposed rule 12d1–4 to acquire ETF shares (*i.e.*, an acquiring fund that acquires 3 percent or less of an ETF's outstanding voting securities) would be less likely to redeem shares because it would be less likely to have a sufficient number of shares to permit the acquiring fund to redeem its shares.[292] We estimate that ETFs, their principal underwriters, and brokers and dealers in the aggregate would choose to rely on the safe harbor to redeem or submit a redemption order with respect to ETF shares that were not acquired in reliance on proposed rule 12d1–4 on average two times each year with respect to each ETF.[293]

We request comment on this estimate. If commenters believe this estimate is not reasonable, we request they provide specific data that would allow us to make a more accurate estimate.

There were 601 ETFs as of the end of December 2007.[294] Based on our estimate, two acquiring funds each year would provide a representation to an ETF, its principal underwriter, a broker, or a dealer with respect to each ETF, for a total of 1202 representations. We estimate that each representation would take, on average no more than 0.2 hours to prepare and submit to the ETF, principal underwriter, broker, or dealer.[295] Accordingly, we believe that the total annual collection of information burden for proposed rule 12d1–4 would be 240 hours at a cost of $70,080.[296]

We request comment on these estimates. If commenters believe these estimates are not reasonable, we request they provide specific data that would allow us to make more accurate estimates.

D. Request for Comments

We request comment on whether these estimates are reasonable. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons wishing to submit comments on the collection of information requirements of the proposed amendments should direct them to the Office of Management and Budget, Attention Desk Officer for the Securities and Exchange Commission, Office of

[288] The proposed amendments would add approximately 1.4 hours (0.6 hours (total returns), 0.5 hours (premium/discount information), and 0.3 hours (foreign holidays)), which staff estimates would be offset by approximately 1.4 hours (elimination of description of creation units and associated fees).

[289] *See* discussion in Section IV.A–B *supra.*

[290] See proposed rule 12d1–4(b)(1).

[289] *See* proposed rule 12d1–4(b)(2).

[292] ETF shares are redeemed only in creation unit aggregations. A creation unit typically consists of at least 25,000 shares. *See supra* note 113.

[293] We recognize that some ETFs may receive more redemption requests from acquiring funds and may rely on the safe harbor more often, while other ETFs may receive no redemption requests or may not choose to rely on the safe harbor when they receive a redemption request from an acquiring fund.

[294] *ICI ETF Assets 2007, supra* note 5.

[295] The proposed rule does not specify language that must appear in the representation. It simply requires the acquiring fund to represent that the shares submitted for redemption are not shares acquired in excess of the limits of section 12(d)(1)(A)(i) of the Act in reliance on proposed rule 12d1–4. Accordingly, we expect that while initial representations might take half an hour to draft, these representations would soon conform to an industry standard that would take no more than a few minutes to produce.

[296] These estimates are based on the following calculations: 1202 representations × 0.2 hours = 240.4 hours; 240 hours × $292 (hourly rate for a fund attorney) = $70,080.

Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC 20503, and should send a copy to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–07–08. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this Release; therefore a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication of this Release. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–07–08, and be submitted to the Securities and Exchange Commission, Public Reference Room, 100 F Street, NE., Washington, DC 20549–1520.

VIII. Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits imposed by its rules. As discussed above, the proposed rules and rule amendments would permit funds to engage in activities and transactions that are otherwise prohibited under the Act without the expense and delay of obtaining an individual exemptive order. Specifically, proposed rule 6c–11 would permit ETFs to form and operate. Proposed rule 12d1–4 would permit a fund to invest in ETFs beyond the limits of section 12(d)(1) of the Act, and proposed amendments to rule 12d1–2 would expand the investment options available to funds that rely on the exemptive relief in section 12(d)(1)(G) of the Act. The proposed amendments to Form N–1A are designed to provide more useful information to investors who purchase and sell ETF shares on national securities exchanges, while simplifying the form by permitting most, if not all, ETFs to exclude information related to the purchase and redemption of creation units.[297] This cost-benefit analysis examines the costs and benefits to ETFs, acquiring funds, and investors that would result from reliance on the proposed exemptive rules and rule and form amendments, in comparison to the costs and benefits associated with obtaining an exemptive order from the Commission.

A. Rule 6c–11

1. Benefits

Proposed rule 6c–11 would codify much of the relief and conditions of exemptive orders that we have issued to ETFs in the past.[298] Proposed rule 6c–11 would require an ETF that relies on the proposed rule either to (i) disclose on its Internet Web site each business day the identities and weightings of the component securities and other assets held by the fund, or (ii) have a stated objective of obtaining results that correspond to the returns of a securities index whose index provider discloses on its Internet Web site the identities and weightings of the component securities and other assets of the index.[299] An ETF that meets one of these requirements could redeem shares in creation unit aggregations, have its shares traded at current market prices, engage in in-kind transactions with certain affiliates, and in certain circumstances, redeem shares in more than seven days.[300]

Elimination of Exemptive Order Costs. We anticipate that ETFs, their sponsors, and ETF investors would benefit from the proposed rule. ETFs and their sponsors increasingly have sought exemptive orders (which the Commission has granted) to form and operate as open-end management companies under the Act. The application process involved in obtaining exemptive orders imposes direct costs on ETFs and their sponsors, including preparation and revision of an application, as well as consultations with Commission staff. The proposed rule would benefit ETFs and their sponsors by eliminating the direct costs of applying to the Commission for an exemptive order to form and operate as permitted under the rule.[301] The rule would further benefit ETFs and their sponsors by eliminating the uncertainty that a particular applicant might not obtain relief to form and operate as permitted under the rule. We anticipate that the elimination of the direct costs of exemptive applications also may benefit ETF investors by enabling ETFs to lower their costs as a result of lower start-up costs.

We seek comment on whether the elimination of these direct costs would result in additional benefits to ETFs or their investors. Are there other costs of the proposed rule that would offset any cost savings resulting from not having to file an exemptive application?

The exemptive application process also involves other indirect costs. ETFs and their sponsors that apply for an order forgo potential market opportunities until they receive the order, while others forgo the market opportunity entirely rather than seek an exemptive order because they have concluded that the cost of seeking an exemptive order would exceed the anticipated benefit of the market opportunity.[302] These direct and indirect costs currently may prevent smaller ETFs and their sponsors from coming to market because they have determined that the cost of an exemptive application may exceed the potential benefit. Eliminating these costs may allow more ETFs, particularly smaller ETFs, to come to market.

We seek comment this analysis. Would removing the regulatory burdens facilitate greater innovation in the ETF market place, particularly with respect to smaller ETFs?

Increased Investment Options. We expect that the proposed rule also would benefit ETF investors to the extent it would remove a possible disincentive for some ETFs and their sponsors to form and operate as open-end funds and provide investors with additional investment choices. As noted above, the direct and indirect costs of the exemptive application process may discourage potential sponsors, particularly smaller sponsors interested in offering smaller, more narrowly focused ETFs which may serve the particular investment needs of certain investors. By eliminating the need for individual exemptive relief, we anticipate that the proposed rule would, over time, lead to an increase in ETFs. In those circumstances, the proposed rule would provide ETF investors with greater investment choices, while also providing them with the protections afforded by the Investment Company Act.

We seek comment on this analysis. Would the proposed rule result in increased investment options?

Elimination of Certain Exemptive Order Terms. Proposed rule 6c–11 also may benefit ETFs and their sponsors by eliminating certain terms contained in exemptive orders that we believe may be addressed by other provisions of the

[297] As noted above, information on how creation units are offered to the public is required to be disclosed in the SAI. Item 18(a) of Form N–1A.

[298] The proposed rule does not codify exemptions previously provided to ETFs organized as UITs because the Commission has not received an exemptive application for a new ETF to be organized as a UIT since 2002. *See* discussion in Section III.A.3 of this release.

[299] Proposed rule 6c–11(e)(4)(v); *see also* discussion in Section III.B.1 of this release for a discussion of these conditions.

[300] Proposed rule 6c–11(a)–(d); *see also* discussion in Section III.C. of this release.

[301] The cost to an ETF for submitting an application ranges from approximately $75,000 to $350,000. These figures are based on conversations with attorneys and ETF employees who have been involved in submitting applications to the Commission.

[302] The time involved in obtaining an order from the Commission ranges from several months to several years depending on the nature, complexity, and de novo consideration of the exemptions sought.

federal securities laws. We propose to eliminate the terms designed to prevent the communication of material non-public information between the ETF and its affiliated index provider because we believe that there are sufficient requirements under federal securities laws and the rules of national securities exchanges to protect against the abuses the terms were intended to address.[303] We anticipate that eliminating these regulatory burdens may reduce costs of operating an ETF and thereby facilitate greater competition and innovation among ETFs.

We request comment on this analysis. Are there any costs associated with eliminating these terms?

2. Costs

We do not expect the proposed rule would impose mandatory costs on any ETF. As discussed above, the proposed rule is exemptive, and we expect that a fund would not operate as an ETF in reliance on the rule if the anticipated benefits did not justify the costs. We expect the costs of relying on the proposed rule are likely to be the same as or less than the costs to an ETF that relies on an existing exemptive order because the proposed rule includes the same or fewer conditions than existing orders that provide equivalent exemptive relief.

The proposed rule would affect different types of ETFs and their sponsors in different ways. A sponsor or adviser that has not sought and would not seek exemptive relief to form and operate an ETF registered under the Act would not be affected by the rule. For an ETF and its sponsor that currently rely on an exemptive order, there may be one-time ''learning costs'' in determining the differences between the order and rule. After making this determination, we expect that the costs for this ETF would be the same as or less than the costs of relying on its exemptive order because the rule contains the same or fewer conditions than existing orders. In addition, an ETF and its sponsor that currently rely on an exemptive order could generally satisfy all the conditions of the rule that provide similar exemptive relief without changing its operation. Finally, a sponsor that has not relied on an exemptive order and that intends to rely on the proposed rule would bear the same or lower continuing costs of complying with conditions that it would have borne had it obtained an exemptive order. In that case, its total costs are likely to have been the same as or greater than the costs associated with the proposed rule.

We request comment on this analysis. Would ETFs that currently rely on an order bear lower costs if they relied on the proposed rule? Would an ETF have to change its operation in any way to comply with the proposed rule?

Prospectus Delivery. The proposed rule does not provide an exemption from prospectus delivery that most ETFs and their sponsors have requested and we have provided in our orders. Most of our orders have exempted broker-dealers selling ETF shares from the obligation to deliver prospectuses in most secondary market transactions.[304] Those applicants have represented that broker-dealers would instead deliver a ''product description'' containing basic information about the ETF and its shares.[305] Because proposed rule 6c–11 would not contain a similar exemption, broker-dealers would be required to deliver a prospectus meeting the requirements of section 10 of the Securities Act to investors purchasing ETF shares.[306] We believe an exemption allowing broker dealers to deliver product descriptions would be unnecessary given our proposal regarding summary prospectus disclosure. If we adopt the Enhanced Disclosure Proposing Release, broker-dealers selling ETF shares could deliver a summary prospectus in secondary market transactions.[307] Although there may be costs associated with printing and delivering prospectuses to secondary market purchasers, we expect these costs to be minimal. We understand that many, if not most, broker-dealers selling ETF shares in secondary market transactions, in fact, transmit a prospectus to purchasers, and thus they may not have relied on the exemptions provided in the orders. In addition, we anticipate these costs could be offset by the fact that the ETFs would not have to prepare product descriptions and by the simplified prospectus disclosure in this proposal.[308]

We anticipate that any cost associated with this requirement may be justified by the benefits to ETF investors. Prospectuses provide ETF investors with standardized information about an investment in an ETF and the differences between an ETF and a traditional mutual fund. Because prospectuses are standardized forms the content of which has been prescribed by the Commission, their delivery could promote greater uniformity in the content and level of disclosure among existing and future ETFs. Finally, our proposed amendments to the prospectus should provide more useful information to investors who purchase and sell ETF shares on a national securities exchange, while simplifying prospectuses by permitting ETFs to exclude information related to the purchase and redemption of creation units.

We request comment on this analysis. Are we correct in assuming that prospectus delivery costs would be offset by the elimination of product descriptions?

Conditions. All ETFs seeking to rely on the rule would have to be listed on an exchange that disseminates the per share NAV of the ETFs' baskets at regular intervals. This condition was included in our exemptive orders and, therefore, should not result in an increased cost to existing ETFs. Each ETF also must, in any sales literature (as defined in the rule), identify itself as an ETF, which does not sell or redeem individual shares, and explain that investors may purchase or sell individual shares on national securities exchanges. This condition is similar to one included in our exemptive orders and, therefore, should not result in an increased cost to existing ETFs. In addition, the ETF would be required either to (i) disclose on its Internet Web

[303] *See* Section III.B.4 of this release for a discussion of this condition.

[304] The orders have granted exemptions from section 24(d) of the Act, which makes inapplicable the dealer exception in section 4(3) of the Securities Act to transactions in redeemable securities issued by an open-end investment company. 15 U.S.C. 80a–24(d); 15 U.S.C. 77d(3); *see, e.g.*, WisdomTree Order, *supra* note 12. ETFs that have this exemption, however continue to be subject to prospectus delivery requirements in connection with sales of creation units and other non-secondary market transactions. Our most recent orders, however, do not provide an exemption from prospectus delivery requirements. *See* Actively Managed ETF Orders, *supra* note 20.

[305] *See, e.g.*, Ziegler Notice, *supra* note 110. The product description provides a summary of the salient features of the ETF and its shares, including the investment objectives of the fund, the manner in which ETF shares trade on the secondary market, and the manner in which creation units are purchased and redeemed. National securities exchanges on which ETFs are listed have adopted rules requiring the delivery of product descriptions. *See, e.g.*, American Stock Exchange Rules 1000 and 1000A.

[306] 15 U.S.C. 77j. We also are proposing to amend our orders to exclude the section 24(d) exemption we have issued to existing ETFs. Accordingly, the prospectus delivery requirement would apply to all ETFs, including ETFs operating under current exemptive orders. *See supra* Section III.E for a discussion of this proposed amendment to existing orders.

[307] *See supra* notes 145–152 and accompanying text. The summary prospectus would contain material information that may not appear in a product description, but like a product description, would be in a form that would be easy to use and readily accessible.

[308] The preparation of a product description can cost approximately $360 to $11,000 per ETF. These figures are based on conversations with attorneys and ETF employees.

site each business day the identities and weightings of the component securities and other assets held by the fund, or (ii) have a stated objective of obtaining results that correspond to the returns of a securities index whose index provider discloses on its Internet Web site the identities and weightings of the component securities and other assets of the index.[309] Index-based ETFs comply with the latter requirement and, therefore, this condition should not result in an increased cost to ETFs that would track a transparent index. ETFs that choose to rely on the former condition, including the actively managed ETFs subject to the recent exemptive orders we issued, would incur costs in connection with developing a Web page for this disclosure and updating the disclosure daily.[310] We expect these costs to be of the same magnitude as the costs borne by index providers in making their indexes transparent. Although this may be a reallocation of costs from index providers to those ETFs that choose to fully disclose their portfolios, we do not believe that this change would significantly affect the costs borne by ETF investors. The new disclosure costs for ETFs that choose to disclose their portfolios rather than track a transparent index would be offset by the lack of index licensing fees that are generally charged to index-based ETFs.

We request comment on whether investors in an actively managed ETF would incur any additional costs as a result of the portfolio disclosure. We also request comment on our analysis.

B. Amendments to Form N–1A

1. Benefits

As discussed above, most of our orders have exempted broker-dealers selling ETF shares from the obligation to deliver prospectuses in secondary market transactions. Applicants for those orders have represented that they would instead require that broker-dealers deliver a product description containing basic information about the ETF and its shares. We are not including a similar exemption in proposed rule 6c–11, and thus a broker-dealer would be required to deliver a prospectus meeting the requirements of section 10 of the Securities Act to investors purchasing ETF shares. In light of this requirement, we also are proposing amendments to Form N–1A, and the summary prospectus, designed to meet the needs of investors (including retail investors) who purchase shares in the secondary market rather than institutional investors purchasing creation units from the ETF.

Material Information to ETF Investors. We expect that the primary benefit of our proposed amendments would be to provide ETF investors purchasing shares in the secondary market with information on the investment that currently is not included in product descriptions, such as the fund's fee table and the name and length of service of the portfolio manager. This should provide ETF investors with information necessary to understand an investment in an ETF. This information also may be helpful to investors in making portfolio allocation decisions.

Simplified Disclosure. Our proposed amendments are designed to simplify prospectus and periodic report disclosure in two ways. First, the proposal would allow ETFs to exclude from the prospectus information on how to purchase and redeem creation units, including information on fees and expenses associated with creation unit sales or purchases. Current ETF prospectuses and periodic reports include detailed information on how to purchase and redeem creation units. The fee table and example include information on transaction fees payable only by creation unit purchasers. Our proposed amendments would permit ETFs with creation units of at least 25,000 shares to exclude this information because it is not relevant (and potentially confusing) to investors purchasing in secondary market transactions.[311] This proposed provision should simplify ETF prospectuses without compromising the disclosure provided to investors who purchase ETF shares in secondary market transactions.

Second, the proposed amendment would incorporate current disclosure requirements mandated by our exemptive orders into the prospectus instead of in a supplemental section where ETFs currently locate it. Our exemptive orders require ETFs to include in their prospectuses and annual reports returns based on market price in addition to returns based on NAV, which as discussed above, may be different than the fund's NAV and better relate to an ETF investor's experience in the fund.[312] The condition in our exemptive orders did not specify where this information must be located in the prospectus. As a result, ETFs have included an additional table in the prospectus, rather than including market price returns in the average annual returns table required by Item 2 of the Form. The lack of specificity also resulted in ETFs using different time periods for the disclosure, with some using calendar years and others fiscal years. The proposed amendment would eliminate use of a second table, which may confuse investors. It also would require all ETFs to present the information using calendar years, standardizing the reporting period used by ETFs. The proposed amendments would mandate uniform disclosure in the prospectus, which should benefit investors by allowing them to compare ETFs more easily.

Similarly, our exemptive orders required ETFs to include in their prospectuses and annual reports premium/discount information to alert investors of the extent and frequency with which market prices deviated from the fund's NAV.[313] ETFs have generally included this information in a supplemental section of the prospectus and annual report.[314] The proposed amendments would incorporate this disclosure in the Shareholder Information section (Item 6 of Form N–1A) of the prospectus and the Management's Discussion of Fund Performance (Item 22(b)(7) of the annual report). We anticipate that this would benefit ETF investors by simplifying the prospectuses and annual reports of ETFs while codifying important disclosures mandated by our exemptive orders.

2. Costs

The primary goal of our proposed amendments is to provide investors in ETF shares with more valuable information regarding an investment in an ETF. We do not expect that the proposed amendments would result in significant additional costs to ETFs.[315] As noted above, our proposed disclosure amendments generally would codify disclosure requirements in existing ETF exemptive orders. To the extent the proposed amendments

[309] Proposed rule 6c–11(e)(4)(iv).

[310] For purposes of the Paperwork Reduction Act, the staff estimated that each ETF would spend approximately $22,520 to develop the Web site. The staff also estimates that each ETF would spend 200 hours annually to update the site daily. *See supra* notes 267–268 and accompanying text.

[311] *See supra* notes 158–161 and accompanying text for a discussion of this proposed amendment.

[312] *See supra* notes 163–165 and accompanying text for a discussion of this proposed amendment.

[313] *See supra* notes 166–170 and accompanying text for a discussion of this proposed amendment.

[314] *See e.g.*, iShares MSCI Series, Prospectus 62–65 (Jan. 1, 2007); iShares MSCI Series, 2006 Shareholders Annual Report 130–136 (Aug. 31, 2006).

[315] Existing ETFs would face a one-time ''learning cost'' to determine the difference between the current Form N–1A requirements as modified by their exemptive orders and the proposed amendments. We do not anticipate that this cost would be significant given the similarity of the amendments to the conditions in existing exemptive orders.

contain new disclosure requirements, such as, for example, the requirement that ETFs include market price returns in addition to NAV returns in Item 8 of Form N–1A, any costs related to these additional disclosures should be offset by our proposal to exempt ETFs with creation units of 25,000 or more shares from including creation unit purchase and redemption information in their prospectuses and annual reports. Most, if not all ETFs, would be able to rely on this exemption.[316] We anticipate that future ETFs would offer creation units of 25,000 shares or more.

We request comment on this assumption. If ETFs are likely to offer smaller creation units, what is the fewest number of shares likely to be offered in a creation unit?

In addition to codifying disclosure requirements of existing exemptive orders, we are proposing several new disclosure requirements in Form N–1A. First, we propose to require that ETFs include an additional total return calculation under Item 8 using market price returns, which would result in an additional bar chart under Item 2(c)(2)(i) of Form N–1A.[317] Because most ETFs currently calculate and present market price returns in the prospectus pursuant to their exemptive orders, this additional bar chart should result in minimal additional costs because it only requires duplicating the presentation of information in another location. Second, we would require an index-based ETF to compare its performance to its underlying index rather than a benchmark index.[318] This amendment would permit use of a narrow-based or affiliated index and eliminate the opportunity for an index-based ETF to select an index different from its underlying index, which would better reflect whether the ETF's performance corresponds to the index which performance it seeks to track. This amendment replaces the type of index used to present performance data currently required under Form N–1A and, therefore, should not increase the compliance burden for ETFs. Finally, we would require each ETF to identify the principal U.S. market on which its shares are traded and include a statement to the effect that ETF shares are bought and sold on national securities exchanges and that ETF investors trading in these exchanges may be required to pay brokerage commissions.[319] Including these additional statements should present minimal, if any, printing costs.

As noted above, any additional costs incurred by an ETF in complying with these additional disclosures should be offset by the cost-savings of our proposal, which would allow most, if not all, ETFs to exclude creation unit purchase and redemption information in their prospectuses.[320]

C. Rule 12d1–4

1. Benefits

Proposed rule 12d1–4 would codify much of the relief in orders that we have issued permitting funds to invest in ETFs beyond the limits of section 12(d)(1), while eliminating most of the conditions included in the orders. Proposed rule 12d1–4 would permit fund investments in ETFs beyond the limits of section 12(d)(1) if: (i) The acquiring fund (and any entity in a control relationship with the acquiring fund) could not control the ETF;[321] (ii) the acquiring fund does not redeem certain shares acquired in reliance on the rule;[322] (iii) the fees charged by the acquiring fund do not exceed the FINRA sales charge limits;[323] and (iv) the acquired ETF is not itself a fund of funds (*i.e.*, the rule would prohibit a fund of funds of funds, or three-tier fund, structure).[324] In addition, an ETF could not redeem and its principal underwriter, a broker or a dealer could not submit an order for redemption of certain shares acquired by an acquiring fund in reliance on proposed rule 12d1–4.[325] The rule provides a safe harbor for any of those entities if it has: (i) A representation from an acquiring fund that none of the shares to be redeemed was acquired in excess of the limits of section 12(d)(1)(A)(i) of the Act in reliance on proposed rule 12d1–4; and (ii) no reason to believe that the shares to be redeemed were acquired in excess of the limits of section 12(d)(1)(A)(i) in reliance on the proposed rule.[326]

We anticipate that acquiring funds, acquired ETFs, investment advisers, and shareholders of both acquiring funds and acquired ETFs would benefit from the proposed rule. Acquiring funds would be able to purchase and ETFs would be able to sell ETF shares beyond the limits of section 12(d)(1) without obtaining an exemptive order, which can be costly to ETFs and their shareholders.[327] The exemptive application process also involves other indirect costs. ETFs that apply for an order to permit other funds to make additional investments in the ETFs beyond the limits of section 12(d)(1) and funds that would rely on the order issued to the ETF forgo potentially beneficial investments until the ETFs receive the order,[328] while other ETFs (and funds that would rely on the order if issued to the ETF) forgo the investment entirely rather than seek an exemptive order because they have concluded that the cost of seeking an exemptive order would exceed the anticipated benefit of the investment.

Unlike the orders, proposed rule 12d1–4 would not provide an exemption permitting acquiring funds to redeem ETF shares acquired in excess of the three percent limit in section 12(d)(1)(A)(i) of the Act in reliance on the proposed rule. This was designed to limit the potential for an acquiring fund to threaten large-scale redemptions as a means of coercing an ETF.[329] Accordingly, the conditions in the proposed rule differ from those in the exemptive orders. The proposed rule would not include: (i) The participation agreement requirement; (ii) the transmission by an acquiring fund of a

[316] Existing ETFs typically offer creation units of 50,000 or more shares, and the lowest number of shares permitted under current exemptive orders is 25,000

[317] *See supra* note 163.

[318] *See supra* notes 173–174 and accompanying text.

[319] *See supra* note 161 and note 282 and accompanying text.

[320] For purposes of our Paperwork Reduction Act analysis, we have estimated that our proposed amendments would not change the current Form N–1A compliance costs. *See supra* discussion at Section VII of this release.

[321] Proposed rule 12d1–4(a)(1). *See supra* notes 215–219 and accompanying text for a discussion of the proposed condition.

[322] Proposed rule 12d1–4(a)(2) *See supra* note 220 and accompanying and following text for a discussion of the proposed condition.

[323] Proposed rule 12d1–4(a)(3). *See supra* notes 230–233 and accompanying text for a discussion of the proposed condition. Unlike the orders, however, the proposed rule would not require directors to make any special findings that investors are not paying multiple advisory fees for the same services.

[324] Proposed rule 12d1–4(a)(4). *See supra* notes 225–229 and accompanying text for a discussion of the proposed condition.

[325] Proposed rule 12d1–4(b)(1). *See supra* note 221 and accompanying text for a discussion of the proposed condition.

[326] Proposed rule 12d1–4(b)(2). *See supra* note 222 and accompanying text for a discussion of the proposed safe harbor.

[327] We estimate, based on discussions with fund representatives, that the cost of obtaining an exemptive order permitting an acquiring fund to invest in an ETF beyond the limits of section 12(d)(1) ranges from approximately $75,000 to $200,000.

[328] Although these applications for relief are typically processed expeditiously, Commission staff estimates, based on orders issued in the past, that the exemptive application process (from initial filing to issuance of order) has taken on average about 15 months. During that time, Commission staff review and comment on applications, applicants submit responses to comments, and the completed application is summarized in a notice to the public. If an application contains a request for relief in addition to the relief from section 12(d)(1) of the Act, the application process has often taken longer than 15 months.

[329] *See supra* note 220 and accompanying and following text.

list of certain of its affiliates to the ETF; (iii) certain policies and procedures designed to limit the influence an acquiring fund can exert on the ETF; and (iv) limits on certain fees. Elimination of these conditions would reduce regulatory burdens and the cost of compliance for funds that seek to invest in ETFs, facilitating greater participation by funds in the purchase and sale of ETF shares both directly with the ETF and in secondary market transactions.[330] Although the proposed rule would not allow acquiring funds to redeem certain shares from the ETF, we understand that acquiring funds generally sell ETF shares in secondary market transactions, rather than redeem them. Accordingly, we believe that this prohibition would have minimal impact on acquiring funds. Moreover, the adoption of proposed rule 12d1–4 would not preclude an acquiring fund from continuing to rely on exemptive orders we have previously issued or seeking new orders to permit funds to invest in ETFs in excess of the limits of section 12(d)(1) but which do not restrict their ability to redeem ETF shares, subject to the conditions set forth in the orders and described above.

In order to allow acquiring funds to take full advantage of the exemptive relief, proposed rule 12d1–4 also would provide limited relief from rule 17e–1 under the Act. If an investment company in one complex acquired more than five percent of the assets of an ETF in another complex, any broker-dealer affiliated with that ETF would become a (second-tier) affiliated person of the acquiring fund.[331] As a result of the affiliation, the broker-dealer's fee for effecting the sale of securities to (or by) the acquiring fund would be subject to the conditions set forth in rule 17e–1, including the quarterly board review and recordkeeping requirements with respect to certain securities transactions involving the affiliated broker-dealer.[332] The proposed rule would permit an acquiring fund to pay commissions, fees, or other remuneration to a (second-tier) affiliated broker-dealer without complying with the quarterly board review and recordkeeping requirements set forth in rules 17e–1(b)(3) and 17e–1(d)(2).[333] This relief would be available only if the broker-dealer and the acquiring fund became affiliated solely because of the acquiring fund's investment in the ETF. We believe that this relief would enable more funds to take advantage of the exemption provided by the proposed rule.

2. Costs

We do not believe that the rule will impose mandatory costs on any fund. As discussed above, the rule is exemptive, and we believe that a fund would not rely on it if the anticipated benefits did not justify the costs. We believe the costs of relying on the rule would be less than the costs to an acquiring fund (and ETF) that relies on an existing exemptive order to invest in (or sell) ETF shares because the rule includes substantially fewer conditions than existing orders that provide similar exemptive relief with respect to purchases and sales of ETF shares.

In order to rely on the proposed rule for an exemption from section 12(d)(1)(B) limits, an ETF may not redeem and its principal underwriter, or a broker or dealer may not submit for redemption any of the ETF's shares that were acquired by an acquiring fund in excess of the limits of section 12(d)(1)(A)(i) of the Act in reliance on proposed rule 12d1–4.[334] The proposed rule provides a safe harbor for these entities if the entity has (i) received a representation from the acquiring fund that none of the ETF shares it is redeeming was acquired in excess of the limits of section 12(d)(1)(A)(i) in reliance on the rule, and (ii) no reason to believe that the acquiring fund is redeeming any ETF shares that the acquiring fund acquired in excess of the limits of section 12(d)(1)(A)(i) in reliance on the rule.[335]

As noted above, we understand that acquiring funds that invest in ETFs generally do not redeem their shares from the ETF, but rather sell them in secondary market transactions. We also believe that an acquiring fund that would not rely on proposed rule 12d1–4 to acquire ETF shares (*i.e.*, an acquiring fund that acquires 3 percent or less of an ETF's outstanding voting securities) would be less likely to redeem shares because it would be less likely to have a sufficient number of shares to permit the acquiring fund to redeem its shares.[336] We estimate that ETFs, their principal underwriters, and brokers and dealers in the aggregate would choose to rely on the safe harbor to redeem or submit a redemption order with respect to ETF shares that were not acquired in reliance on proposed rule 12d1–4 on average two times each year with respect to each ETF.[337] We believe that the total annual cost for making this representation would be $70,080.[338]

We request comment on these estimates. If commenters believe these estimates are not reasonable, we request they provide specific data that would allow us to make more accurate estimates.

The rule would affect different types of sponsors or advisers in different ways. A sponsor or adviser that has not sought and would not seek exemptive relief to permit another fund to invest in its shares beyond the limits of section 12(d)(1) of the Act would not be affected by the rule. The cost for a sponsor or adviser that currently relies on exemptive relief covered by the rule would be less than the costs of relying on its exemptive order because the proposed rule contains substantially fewer conditions than existing orders. In addition, a sponsor or adviser that currently relies on an exemptive order could satisfy all the conditions of the proposed rule that provides similar exemptive relief with respect to purchases and sales of ETF shares without changing its operation. Finally, a sponsor or adviser that has not relied on an exemptive order and that intends to rely on the proposed rule would avoid the cost of obtaining an exemptive order and would incur lower continuing costs to comply with the conditions included in the proposed rule than it would have borne had it obtained an exemptive order.

D. Amendments to Rule 12d1–2

1. Benefits

The proposed amendments to rule 12d1–2 would expand the type of investments that funds relying on the exemptive relief in section 12(d)(1)(G) of the Act could make. The proposed amendments would allow acquiring funds that invest in affiliated funds in

[330] Based on discussions with fund representatives, we estimate that the cost of negotiating and entering into a participation agreement (and for an acquiring fund preparing the initial list of affiliates) required by our exemptive orders ranges from approximately $5,000 to $10,000. We estimate that the cost to an acquiring fund to review and update its list of affiliates each year as required by our exemptive orders ranges from approximately $4,000 to $15,000.

[331] *See supra* note 239.

[332] *See supra* note 245.

[333] *See supra* note 247 and accompanying text.

[334] *See* proposed rule 12d1–4(b)(1).

[335] *See* proposed rule 12d1–4(b)(2). We believe that the costs associated with this safe harbor would not be significant. Only acquiring funds that intend to redeem less than three percent of an ETF's shares could provide the representations required under the safe harbor.

[336] ETF shares are generally redeemed only in creation unit aggregations. A creation unit typically consists of at least 25,000 shares. *See supra* note 113.

[337] We recognize that some ETFs may receive more redemption requests from acquiring funds and may rely on the safe harbor more often, while other ETFs may receive no redemption requests or may not choose to rely on the safe harbor when they receive a redemption request from an acquiring fund.

[338] *See supra* notes 294–296 and accompanying text.

reliance on section 12(d)(1)(G) to invest in unaffiliated ETFs beyond the statutory limitations as long as the funds comply with the conditions of proposed rule 12d1–4.[339] We also propose to amend rule 12d1–2 to allow funds relying on section 12(d)(1)(G) to invest in assets other than securities.[340] Under the proposed rule, funds relying on the exemptive relief in section 12(d)(1)(G) would be able to invest in, among other things, futures contracts, options, swaps, other derivative investments, and other financial instruments that do not qualify as a security under the Act. Those investments would, of course, have to be consistent with the fund's investment policies.[341] We believe that including these types of investment opportunities would permit funds to allocate their investments more efficiently.

2. Costs

Rule 12d1–2 (and the proposed amendments to the rule) does not impose any conditions on its reliance and thus a fund would not incur any costs in relying on the rule.

E. Request for Comment

The Commission requests comment on the potential costs and benefits of the proposed rules and rule amendments. We also request comment on the potential costs and benefits of any alternatives suggested by commenters. We encourage commenters to identify, discuss, analyze, and supply relevant data regarding any additional costs and benefits. For purposes of the Small Business Regulatory Enforcement Act of 1996,[342] the Commission also requests information regarding the potential annual effect of the proposals on the U.S. economy. Commenters are requested to provide empirical data to support their views.

IX. Consideration of Promotion of Efficiency, Competition and Capital Formation

Section 2(c) of the Investment Company Act requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is consistent with the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[343]

A. Proposed Rules 6c–11

Proposed rule 6c–11 would codify much of the relief and conditions of exemptive orders that we have issued to ETFs. The rule would provide relief to ETFs by permitting an ETF to operate without first obtaining an exemptive order from the Commission. As noted above, the direct and indirect costs of the exemptive application process may discourage potential ETF sponsors. The proposed rule also would not include conditions contained in exemptive orders designed to address particular concerns that we now believe are addressed by other provisions of the federal securities laws.[344] Eliminating the need for individual exemptive relief and compliance with specific conditions may reduce costs of introducing and operating an ETF, and may permit additional opportunities for sponsors to introduce new ETFs, particularly smaller sponsors interested in offering smaller, more narrowly focused ETFs which may serve particular investment needs of certain investors. We therefore anticipate that the proposed rule would, over time, lead to an increase in ETFs.

We expect that the proposal is likely to increase competition and efficiency. By making it easier for sponsors, particularly smaller sponsors, to introduce ETFs, the proposal should allow more sponsors to enter the marketplace, thereby increasing competition among ETF sponsors. The resulting increase in ETFs that we expect also should increase competition and innovation among funds. The proposal also should promote efficiency because the increase in ETFs should provide investors with more investments that may be specifically tailored to their particular investment objectives. We do not expect the proposed rule would have an adverse impact on capital formation.

B. Amendments to Form N–1A

The proposed amendments to Form N–1A are designed to provide more useful information to investors (including retail investors) who purchase shares in the secondary market, rather than institutional investors purchasing creation units from the ETF. The proposed amendments would require ETFs, in addition to providing returns based on NAV, to include returns based on the market price of fund shares, and to disclose in the ETF prospectus the number of trading days on which the market price of the ETF shares was greater than the ETF's NAV and the number of days it was less than the ETF's NAV (premium/discount information). This information should promote more efficient allocation of investments by investors and more efficient allocation of assets among competing ETFs because investors may compare and choose ETFs based on their market returns and deviations from NAV more easily. These amendments also should improve competition because they may prompt sponsors to launch ETFs that provide improved market price returns or lesser premiums/discounts. We do not believe the proposed amendments would have an adverse impact on capital formation.

C. Proposed Rule 12d1–4 and Amendments to Rule 12d1–2

Proposed rule 12d1–4 and the proposed amendments to rule 12d1–2 would expand the circumstances in which funds can invest in ETFs without the ETF first obtaining an exemptive order from the Commission, which can be costly and time-consuming. We anticipate that the proposed rule and amendments would promote efficiency and competition. Proposed rule 12d1–4 would permit funds to acquire shares of ETFs in excess of the limitations in section 12(d)(1) of the Act. This exemption should allow acquiring funds to allocate their investments more efficiently by expanding their investment options to include holdings in ETFs beyond the limits of section 12(d)(1) in order to meet the funds' investment objectives. We also anticipate that the proposed rule would promote efficiency because permitting funds to buy creation units might benefit other ETF investors buying and selling ETF shares in secondary market transactions by increasing the number of institutional investors participating in the arbitrage process. The proposed rule might promote competition by increasing the pool of ETFs that accept investments by other funds beyond section 12(d)(1) limits. Proposed rule 12d1–4 would eliminate the need for ETFs to obtain an exemptive order from the Commission, the cost of which might discourage ETFs, particularly smaller ETFs, from accepting or seeking fund investments beyond section 12(d)(1) limits.[345]

[339] Proposed rule 12d1–2(a)(4).

[340] Proposed rule 12d1–2(a)(5).

[341] *See* Item 4 of Form N–1A (requiring disclosure of funds' investment objectives and principal investment strategies).

[342] Pub. L. 104–121, Title II, 110 Stat. 857 (1996).

[343] 15 U.S.C. 80a–2(c).

[344] *See supra* Section III.B.5. of this release for a discussion of these conditions.

[345] As noted above, the proposed rule also would not incorporate many of the conditions contained in our exemptive orders. The compliance costs of such conditions might otherwise discourage ETFs, particularly small ETFs, from accepting or seeking fund investments beyond section 12(d)(1) limits. *See supra* note 330 and accompanying and following text. By eliminating most of the conditions from our exemptive orders, more ETFs

Continued

The proposed rule would provide relief from section 17(e) for funds that execute transactions with certain broker-dealers affiliated with ETFs in which the acquiring funds invest. This relief, which is not included in our exemptive orders, should allow more funds to take full advantage of the exemption provided by the rule, thereby increasing the potential that the proposed rule would promote efficiency and competition.[346]

The proposed amendments to rule 12d1–2 expand the investment options for funds that rely on the exemption in section 12(d)(1)(G) of the Act to include investments in unaffiliated ETFs beyond the section 12(d)(1) limits and assets other than securities. This expansion of investment opportunities could permit funds to allocate their investments more efficiently. This may allow a fund to compete more effectively. We do not expect that proposed rule 12d1–4 or the proposed amendments to rule 12d1–2 would have an adverse impact on capital formation.[347]

X. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis (''IRFA'') has been prepared in accordance with 5 U.S.C. 603. It relates to proposed new rules 6c–11 and 12d1–4 and proposed amendments to rule 12d1–2 under the Investment Company Act, and to Form N–1A under the Investment Company Act and the Securities Act.

A. Reasons for the Proposed Actions

1. ETFs

As described more fully in sections I and III of this release, we are proposing rule 6c–11 to allow new ETFs to enter the market without first obtaining an exemptive order from the Commission.[348] The proposed rule would codify and expand upon the exemptive orders we have issued to ETFs allowing them to form and operate. In conjunction with proposed rule 6c–11, we also are proposing amendments to Form N–1A, as described more fully in sections I and III.D of this release, to provide more useful information to investors who purchase and sell ETF shares on a securities exchange.

2. Investment Company Investments in ETFs

As described more fully in sections I and IV of this release, we are proposing new rule 12d1–4 to permit funds to invest in shares of ETFs beyond the limits of section 12(d)(1)(A) without first obtaining an exemptive order from the Commission. The proposed rule would codify exemptions provided in orders we have issued permitting funds to invest in ETFs beyond the Act's limits. We also are proposing amendments to rule 12d1–2, as described more fully in section V of this release, to expand the investment options available to funds that rely on section 12(d)(1)(G) of the Act.

B. Objectives of the Proposed Actions

1. ETFs

As described more fully in sections I and III of this release, the objectives of the proposed rule 6c–11 are to allow new ETF competitors to enter the market more easily and eliminate certain conditions contained in the outstanding orders that we now believe may be unnecessary. As described more fully in sections I and III.D of this release, the objective of the proposed amendments to Form N–1A is to provide more useful information to individual investors who purchase and sell ETF shares on national securities exchanges.

2. Investment Company Investments in ETFs

As more fully described in sections I and IV of this release, proposed rule 12d1–4 is intended to allow funds to invest more easily in ETFs beyond the limits of section 12(d)(1) of the Act subject to certain conditions designed to protect investors. As more fully described in Section V of this release, the proposed amendments to rule 12d1–2 are intended to expand the investments options available to funds that rely on section 12(d)(1)(G) to include: (i) Investments in unaffiliated ETFs beyond the limits of section 12(d)(1) of the Act consistent with proposed rule 12d1–4; and (ii) other non-securities assets, which do not appear to raise concerns that the investment limits of section 12(d)(1)(G) were intended to address. The proposed amendments to rule 12d1–2 would provide funds relying on section 12(d)(1)(G) with greater flexibility to meet their investment objectives.

C. Legal Basis

The statutory authority for proposed rules 6c–11 and 12d1–4 and the proposed amendments to rule 12d1–2 and Form N–1A is set forth in Section XI of this release.

D. Small Entities Subject to the Proposed Rule and Amendments

A small business or small organization (collectively, ''small entity'') for purposes of the Regulatory Flexibility Act[349] is a fund that, together with other funds in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[350] Of approximately 601 ETFs (593 registered open-end investment companies and 8 registered UITs), only 1 (an open-end fund) is a small entity.[351] There are approximately 145 fund complexes[352] and 43 business development companies[353] that are small entities that could choose to rely on proposed rule 12d1–4 to invest in ETFs beyond the limits of section 12(d)(1).

1. ETFs

Commission staff expects proposed rule 6c–11 and amendments to Form N–1A would have little impact on small entities. Like other funds, small entities would be affected by proposed rule 6c–11 and the proposed amendments to Form N–1A only if they determine to rely on rule 6c–11 to operate as an ETF. Small entities that are open-end ETFs and currently rely on an exemptive order also would be affected by the proposed amendments to Form N–1A. Commission staff estimates that only one of the 61 orders permitting funds to operate as ETFs was issued to a small entity. The staff anticipates that the number of funds, including small funds, that would operate as an ETF under proposed rule 6c–11 and also therefore be subject to the disclosure requirements contained in the proposed amendments to Form N–1A would

may accept and seek fund investments in their shares.

[346] *See supra* Section IV.C.3 for a discussion of the proposed exemption.

[347] While proposed rule 12d1–4 may result in additional investments in ETFs, we do not anticipate that the rule would have a significant impact on capital formation.

[348] Our exemptive orders have provided ETFs with relief from a number of sections in the Act in order to allow them to operate. *See supra* Section III.C.

[349] 5 U.S.C. 601–612.

[350] 17 CFR 270.0–10.

[351] For purposes of this IRFA, any series or portfolio of an ETF is considered a separate ETF.

Therefore, there are 601 portfolios or series of registered investment companies operating as ETFs. For purposes of determining whether a fund is a small entity under the Regulatory Flexibility Act, however, the assets of funds (including each portfolio and series of a fund) in the same group of related investment companies are aggregated.

[352] The 145 fund complexes contain in the aggregate 160 funds that are small entities. This estimate is derived from data reported on Forms N–SAR and N–CSR filed with the Commission for the period ending June 30, 2007.

[353] This estimate is based on data reported on Forms 10–K and 10–Q filed with the Commission for the period ending June 30, 2007.

increase as compared with the number of applicants. Nevertheless, the staff believes that the proportion of small entities compared to the total number of funds that operate as ETFs would remain small.

2. Investment Company Investments in ETFs

Commission staff expects proposed rule 12d1–4 and the proposed amendments to rule 12d1–2 to have little impact on small entities. Like other funds, small entities would only be affected by the rule and the amendments if they determine to rely on the exemptions provided by the proposed rule and amendments.[354] Commission staff estimates that none of the approximately 15 exemptive orders issued to ETFs allowing other funds to invest in the ETFs beyond the limits of section 12(d)(1) was issued to a small entity. Similarly, none of the applications that has sought to allow a fund that relied on section 12(d)(1)(G) of the Act to invest in securities other than funds in the same complex, government securities, and short-term paper was a small entity. The staff anticipates that the number of funds, including small funds, that would rely on the proposed rule and rule amendments would be greater than the number of funds that currently rely on exemptive orders. Nevertheless, the staff believes that the proportion of small entities compared to the total number of funds that would rely on the proposed rule and rule amendments would be small.

E. Reporting, Recordkeeping, and Other Compliance Requirements

1. ETFs

Proposed rule 6c–11 would not impose any recordkeeping requirements on any person and would not materially increase other compliance requirements. Proposed rule 6c–11 would impose reporting requirements on funds that choose to rely on the rule.[355] Funds relying on the rule would have to disclose: (i) The foreign holidays that would prevent timely satisfaction of a redemption request; [356] (ii) the basket assets; [357] (iii) the number of shares in a creation unit; [358] (iv) the fund's NAV, the market closing price for its shares, and the premium/discount between its NAV and the market closing price daily on its Internet Web site; [359] and (v) the identities and weightings of the component securities and other assets held by the fund.[360] The proposed rule also would impose compliance requirements on ETFs that are essential to the operation of an ETF. A fund that chose to rely on the proposed rule would be required to have (i) its shares approved for listing and trading on a national securities exchange,[361] and (ii) the Intraday Value of the basket assets disseminated at regular intervals during the day by a national securities exchange.[362]

Proposed rule 6c–11 may benefit fund shareholders by allowing funds to operate as ETFs without incurring the costs and delays associated with the exemptive application process and without having to comply with some of the conditions included in the exemptive orders. While the rule would require ETFs to comply with reporting and compliance requirements, these requirements would not involve any new costs for ETFs because these requirements (as well as additional requirements) are included in the ETF exemptive orders.

The proposed amendments to Form N–1A would impose reporting requirements on open-end funds that operate as ETFs. The proposed amendments would require an ETF to disclose in its prospectus and annual reports: (i) Returns based on the market price of its shares; [363] (ii) the number of trading days on which the market price of its shares was greater than its NAV and the number of days it was less than its NAV (premium/discount information); [364] and (iii) a comparison of its performance, if it is an index-based ETF, to its underlying index rather than a benchmark index.[365] The proposed amendments also would require the ETF to disclose in its prospectus the trading symbol(s) and principal U.S. market(s) on which its shares are traded.[366]

The proposed amendments to Form N–1A also would eliminate some disclosure requirements for ETFs with creation units of 25,000 or more shares and replace them with fewer disclosures. Under the proposed amendments, those ETFs would not have to: (i) Disclose information on how to buy and redeem shares of ETF; [367] or (ii) include in its fee table in its prospectus or annual and semi-annual reports fees and expenses for purchases or sales of creation units.[368]

The amendments to Form N–1A are designed to accommodate the use of the

[354] Small acquiring funds could choose to rely on the proposed rule to invest in ETFs beyond the limits of section 12(d)(1)(A) of the Act, and small ETFs could choose to rely on the rule to sell their shares to other funds beyond the limits of section 12(d)(1)(B) of the Act. Small acquiring funds that rely on section 12(d)(1)(G) of the Act could choose to rely on the proposed amendments to rule 12d1–2 to invest in ETFs in reliance on proposed rule 12d1–4 and to invest in assets other than securities.

[355] In addition to the reporting requirements, the proposed rule, unlike most of the ETF exemptive orders, would not include relief from section 24(d) of the Act and thus broker-dealers would be required to deliver prospectuses to investors in secondary market transactions. We also propose to amend the existing ETF exemptive orders issued to open-end funds to eliminate the section 24(d) exemptions and require ETFs relying on the orders to satisfy their prospectus delivery requirements. We understand that many, if not most, broker-dealers selling ETF shares in secondary market transactions, in fact, transmit a prospectus to purchasers. Therefore, we anticipate that the proposed amendment to the ETF orders would have little if any impact on ETFs, including small ETFs.

[356] Proposed rule 6c–11(c)(1). Funds would have to disclose this information in their registration statements (Form N–1A) and in any sales literature.

[357] Proposed rule 6c–11(e)(1).

[358] Proposed rule 6c–11(e)(3). Funds would have to disclose this information in their registration statements (Form N–1A) and in any sales literature.

[359] Proposed rule 6c–11(e)(4)(iii), (iv).

[360] Proposed rule 6c–11(e)(4)(iv)(A). If the fund has a stated investment objective of obtaining returns that correspond to the returns of a securities index, reliance on the proposed rule would be conditioned on the ETF tracking an index whose provider discloses on its Internet Web site the identities and weightings of the component securities and other assets of the index in lieu of disclosure on the fund's Internet Web site. Proposed rule 6c–11(e)(4)(iv)(B).

[361] Proposed rule 6c–11(e)(4)(iii).

[362] Proposed rule 6c–11(e)(4)(i).

[363] Proposed Instruction 5(a) to Item 2(c)(2) of Form N–1A; Proposed Instruction 3(f) to Item 8(a) of Form N–1A; Proposed Instruction 12(b) to Item 22(b)(7) of Form N–1A. Form N–1A currently only requires an ETF to disclose in its prospectus its return based on its NAV. The annual reports also would have to contain a new line graph comparing the initial and subsequent account values using market price, following the line graph using NAV required by Item 22(b)(7)(ii)(A) of Form N–1A. Proposed Instruction 12(a) to Item 22(b)(7) of Form N–1A.

[364] Proposed Item 6(h)(4) of Form N–1A (requiring proposed premium/discount information in the prospectus to span the most recently completed calendar year and quarters since that year); Proposed Item 22(b)(7)(iv) of Form N–1A (requiring proposed premium/discount information disclosed in annual reports to span five fiscal years). The ETF would be required to present premiums or discounts as a percentage of NAV and to explain that shareholders may pay more than NAV when purchasing shares and receive less than NAV when selling, because shares are bought and sold at market prices. Proposed Instructions 2,3 to Item 6(h)(4) of Form N–1A; Proposed Instruction (b), (c) to Item 22(b)(7)(iv).

[365] Proposed Instruction 5(b) to Item 2(c)(2) of Form N–1A; Proposed Instruction 12(c) to Item 22(b)(7) of Form N–1A.

[366] Proposed Item 6(h)(2) of Form N–1A.

[367] Proposed Item 6(h)(1) of Form N–1A. Instead ETF prospectuses could simply state that individual fund shares can only be bought and sold on the secondary market through a broker-dealer. Proposed Item 6(h)(3) of Form N–1A.

[368] Proposed Instruction 1(e)(i) to Item 3 of Form N–1A; Proposed Instruction 1(e)(i) to Item 22(d) of Form N–1A. An ETF would instead modify the narrative explanation preceding the example in the fee table to state that fund shares are sold on the secondary market rather than redeemed at the end of the periods indicated, and that investors in its shares may be required to pay brokerage commissions that are not reflected in the fee table. Proposed Instruction 1(e)(ii) to Item 3 of Form N–1A; Proposed Instruction 1(e)(ii) to Item 22(d) of Form N–1A.

form by ETFs and to meet the needs of investors (including retail investors) who purchase ETF shares in secondary market transactions rather than institutional investors purchasing creation units directly from the ETF. We believe that the amendments would have a negligible impact (if any) on the disclosure burdens on ETFs while providing necessary information to ETF investors. We do not believe that the proposed amendments to Form N–1A would disproportionately impact small funds.

2. Investment Company Investments in ETFs

Proposed rule 12d1–4 and the proposed amendments to rule 121–2 would not impose any reporting or recordkeeping requirements. The proposed amendments to rule 12d1–2 also would not impose any new compliance requirements on any person. Proposed rule 12d1–4 would impose compliance requirements on funds that choose to rely on it. Proposed rule 12d1–4 would permit fund investments in ETFs beyond the limits of section 12(d)(1) if: (i) The acquiring fund (and any entity in a control relationship with the acquiring fund) does not control the ETF; [369] (ii) the acquiring fund does not redeem certain shares acquired in reliance on the proposed rule; [370] (iii) the fees charged by the acquiring fund do not exceed the FINRA sales charge limits; [371] and (iv) the acquired ETF is not itself a fund of funds (*i.e.*, the rule would prohibit a fund of funds of funds, or three-tier fund, structure).[372] In addition, an ETF could not redeem, and its principal underwriter, a broker or a dealer could not submit for redemption ETF shares acquired in reliance on proposed rule 12d1–4.[373] These compliance requirements, however, would not impose any new costs on acquiring funds or ETFs. Most of these conditions (as well as number of other conditions which are not included in the proposed rule) are included in the exemptive orders that currently permit fund investments in ETFs beyond the limits of section 12(d)(1). We do not anticipate that the additional conditions prohibiting redemptions would impose significant, if any, new costs on acquiring funds or ETFs because we understand that most funds do not redeem shares with ETFs, but sell their shares in secondary market transactions.

F. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission has not identified any federal rules that duplicate, overlap, or conflict with the proposed rules or rule amendments.

G. Significant Alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed rules and amendments, the Commission considered the following alternatives: (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the rule, or any part thereof, for small entities.

1. ETFs

Proposed rule 6c–11 is exemptive and compliance with the rule would be voluntary. We therefore do not believe that special compliance, timetable, or reporting requirements, or an exemption from coverage of the proposed rule for small entities would be appropriate. In addition, as discussed above, only one fund that meets the definition of a small entity currently relies on an exemptive order to operate as an ETF. Therefore, few of the entities that would be affected by the proposed rule would be considered to be small entities. The Commission also believes that proposed rule 6c–11 would decrease burdens on small entities by making it unnecessary for them to seek an exemptive order from the Commission allowing them to operate as ETFS and by eliminating some of the conditions included in the exemptive orders from the proposed rule. As a result, we do not anticipate the potential impact of the proposed rule on small entities would be significant. For these reasons, alternatives to the proposed rule appear unnecessary and in any event are unlikely to minimize any impact that the proposed rule might have on small entities.

The proposed amendments to Form N–1A would only apply to funds that choose to rely on proposed rule 6c–11 or that rely on an exemptive order to operate as an ETF. As discussed above, the proposed amendments to Form N–1A are designed to accommodate the use of the form by ETFs and to meet the needs of investors (including retail investors) who purchase ETF shares in secondary market transactions rather than institutional investors purchasing creation units directly from the ETF. Therefore, we believe that any further clarification, consolidation, or simplification of the proposed amendments would not be consistent with the protection of investors. An exemption for small entities also would defeat the purposes of the amendments.

2. Investment Company Investments in ETFs

Proposed rule 12d1–4 and the proposed amendments to rule 12d1–2 are exemptive and compliance with proposed rule 12d1–4 and the proposed amendments to rule 12d1–2 would be voluntary. We therefore do not believe that special compliance, timetable, or reporting requirements, or an exemption from coverage of the proposed rule or the proposed amendments to rule 12d1–2 for small entities would be appropriate. The Commission believes that proposed rule 12d1–4 and the proposed amendments to rule 12d1–2 would decrease burdens on small entities by making it unnecessary for them to seek an exemptive order from the Commission allowing them to sell their shares to other funds beyond the limits in section 12(d)(1)(B) of the Act or to allow small entities that rely on section 12(d)(1)(G) to invest in assets other than securities and ETFs beyond the limits of section 12(d)(1). In addition, proposed rule 12d1–4 has a limited number of conditions, most of which are included in the exemptive orders. The proposed amendments to rule 12d1–2 do not impose any compliance requirements. As a result the potential impact of the proposed rule and amendments on small entities should not be significant. For these reasons, alternatives to the proposed rule and amendments seem unnecessary and, in any event, unlikely to minimize any impact that the proposed rule and amendments might have on small entities.

H. Solicitation of Comments

The Commission encourages the submission of comments with respect to any aspect of this IRFA. Comment is

[369] Proposed rule 12d1–4(a)(1). *See supra* notes 215–219 and accompanying text for a discussion of the proposed condition.

[370] Proposed rule 12d1–4(a)(2). *See supra* note 220 and accompanying and following text for a discussion of the proposed condition.

[371] Proposed rule 12d1–4(a)(3). *See supra* notes 230–233 and accompanying text for a discussion of the proposed condition.

[372] Proposed rule 12d1–4(a)(4). *See supra* notes 225–229 and accompanying text for a discussion of the proposed condition.

[373] Proposed rule 12d1–4(b)(1). *See supra* note 221 and accompanying text for a discussion of the proposed condition.

specifically requested on the number of small entities that would be affected by the proposed rules and amendments, and the likely impact of the proposals on small entities. Commenters are asked to describe the nature of any impact and provide empirical data supporting its extent. These comments will be considered in connection with any adoption of the proposed rule and amendments, and reflected in a Final Regulatory Flexibility Analysis.

Comments should be submitted in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Comments also may be submitted electronically to the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. S7–07–08, and this file number should be included on the subject line if e-mail is used.[374] Comment letters will be available for public inspection and copying in the Commission's Public Reference Room, 100 Fifth Street, NE., Washington, DC 20549–1520, on official business days between the hours of 10 a.m. and 3 p.m. Electronically submitted comment letters also will be posted on the Commission's Internet Web site (*http://www.sec.gov*).

XI. Statutory Authority

The Commission is proposing rule 6c–11 pursuant to the authority set forth in sections 6(c) and 38(a) of the Investment Company Act [15 U.S.C. 80a–6(c) and 80a–37(a)]. The Commission is proposing amendments to rule 12d1–2 and new rule 12d1–4 pursuant to the authority set forth in sections 6(c), 12(d)(1)(J), and 38(a) of the Investment Company Act [15 U.S.C. 80a–6(c), 80a–12(d)(1)(J), and 80a–37(a)]. The Commission is proposing amendments to registration form N–1A under the authority set forth in sections 6, 7(a), 10 and 19(a) of the Securities Act of 1933 [15 U.S.C. 77f, 77g(a), 77j, 77s(a)], and sections 8(b), 24(a), and 30 of the Investment Company Act [15 U.S.C. 80a–8(b), 80a–24(a), and 80a–29].

List of Subjects

17 CFR Part 239

Reporting and recordkeeping requirements, Securities.

17 CFR Parts 270 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

[374] Comments on the IRFA will be placed in the same public file that contains comments on the proposed rules and amendments.

Text of Proposed Rules and Form Amendments

For reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

1. The authority citation for part 239 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*, 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

2. The authority citation for part 270 is amended by adding a specific authority citation for § 270.6c–11 and revising the specific authority citation for §§ 270.12d1–1, 270.12d1–2 and 12d1–3 to read as follows:

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–34(d), 80a–37, and 80a–39, unless otherwise noted.

* * * * *

Section 270.6c–11 is also issued under 15 U.S.C. 80a–6(c) and 80a–37(a).

* * * * *

Sections 270.12d1–1, 270.12d1–2, 270.12d1–3, and 12d1–4 are also issued under 15 U.S.C. 80a–6(c), 80a–12(d)(1)(J), and 80a–37(a).

* * * * *

3. Section 270.6c–11 is added to read as follows:

§ 270.6c–11 Exchange-traded funds.

(a) *Redeemable securities.* Exchange-traded fund shares are considered ''redeemable securities'' for purposes of section 2(a)(32) of the Act (15 U.S.C. 80a–2(a)(32)).

(b) *Pricing.* A dealer in exchange-traded fund shares is exempt from section 22(d) of the Act (15 U.S.C. 80a–22(d)) and § 270.22c–1(a) with regard to purchases, sales and repurchases of exchange-traded fund shares in the secondary market at the current market price.

(c) *Postponement of redemption.* If an exchange-traded fund includes a foreign security in its basket assets and a foreign holiday prevents timely delivery of the foreign security in response to a redemption request, the fund is exempt, with respect to the foreign security, from the prohibition in section 22(e) of the Act (15 U.S.C. 80a–22(e)) against postponing the date of satisfaction upon redemption for more than seven days after the tender of a redeemable security, if:

(1) The exchange-traded fund discloses in its registration statement the foreign holidays that it expects may prevent timely delivery of foreign securities, and the maximum number of days that it anticipates it will need to deliver the foreign securities; and

(2) Foreign securities are delivered no later than 12 calendar days after the tender of the exchange-traded fund shares.

(d) *Affiliated transactions.* A person who is an affiliated person of an exchange-traded fund solely by reason of holding with the power to vote 5 percent or more, or more than 25 percent, of securities issued by the exchange-traded fund (or who is an affiliated person of such a person), or issued by an investment company under common control with the exchange-traded fund, is exempt from sections 17(a)(1) and 17(a)(2) of the Act (15 U.S.C. 80a–17(a)(1) and (a)(2)) with regard to the deposit and delivery of basket assets. An investment company that has acquired exchange-traded fund shares in reliance on § 270.12d1–4 may not rely on this paragraph with regard to the purchase of basket assets.

(e) *Definitions.* For purposes of this section:

(1) *Basket assets* are the securities or other assets specified each business day in name and number by an exchange-traded fund as the securities or assets in exchange for which it will issue or in return for which it will redeem exchange-traded fund shares; *provided that* the fund may require or permit a purchaser (or redeemer) of a creation unit to substitute cash for some or all of the securities in the basket assets.

(2) *Business day* means, with respect to an exchange-traded fund, any day that the fund is open for business, including any day on which it is required to make payment under section 22(e) of the Act (15 U.S.C. 80a–22(e)).

(3) *Creation unit* is a specified number of exchange-traded fund shares disclosed in the exchange-traded fund's prospectus that the fund will issue (or redeem) in exchange for the deposit (or delivery) of basket assets. The creation unit must be reasonably designed to facilitate the purchase (or redemption) of shares from the exchange-traded fund with an offsetting sale (or purchase) of shares on a national securities exchange at as nearly the same time as practicable for the purpose of taking advantage of a difference in the current value of basket assets on a per share basis and the current market price of the shares.

(4) *Exchange-traded fund* is a registered open-end management company that:

(i) Issues (or redeems) creation units in exchange for the deposit (or delivery) of basket assets the current value of which is disseminated on a per share basis by a national securities exchange at regular intervals during the trading day;

(ii) In any sales literature, identifies itself as an exchange-traded fund, which does not sell or redeem individual shares, and explains that investors may purchase or sell individual exchange-traded fund shares on a national securities exchange;

(iii) Issues shares that are approved for listing and trading on a national securities exchange under section 12(d) (15 U.S.C. 78*l*(d)) of the Securities Exchange Act of 1934 and rule 12d1–1 (17 CFR 240.12d1–1) thereunder;

(iv) Discloses each business day on its Internet Web site, which is publicly accessible at no charge, the prior business day's net asset value and closing market price of the fund's shares, and the premium or discount of the closing market price against the net asset value of the fund's shares as a percentage of net asset value; and

(v) Either:

(A) Discloses each business day on its Internet Web site, which is publicly accessible at no charge, the identities and weightings of the component securities and other assets held by the fund, or

(B) Has a stated investment objective of obtaining returns that correspond to the returns of a securities index specified in the fund's registration statement, and the index provider discloses on its Internet Web site, which is publicly accessible at no charge, the identities and weightings of the component securities and other assets of the index.

(5) *Exchange-traded fund share* is an equity security issued by an exchange-traded fund.

(6) *Foreign security* is any security issued by a government or any political subdivision of a foreign country, a national of any foreign country, or a corporation or other organization incorporated or organized under the laws of any foreign country, and for which there is no established United States public trading market as that term is used in Item 201 of Regulation S–K under the Securities Exchange Act of 1934 (17 CFR 229.201).

(7) *Index provider* is the person that determines the securities and other assets that comprise a securities index.

(8) *Sales literature* means any advertisement, pamphlet, circular, form letter, or other sales material addressed to or intended for distribution to prospective investors other than a registration statement filed with the Commission under section 8 of the Act (15 U.S.C. 80a–8).

(9) *Weighting of the component security* is the percentage of the index's value represented, or accounted for, by such component security.

4. Section 270.12d1–2 is amended by:

a. Revising the heading to paragraph (a);

b. Removing ''and'' at the end of paragraph (a)(2);

c. Removing the period at the end of paragraph (a)(3) and adding a '';'';

d. Adding paragraphs (a)(4) and (a)(5); and

e. Revising paragraph (b).

The additions and revisions read as follows:

§ 270.12d1–2 Exemptions for investment companies relying on section 12(d)(1)(G) of the Act.

(a) *Exemption to acquire other securities and assets.* * * *

(4) Securities issued by an exchange-traded fund, when the acquisition is in reliance on § 270.12d1–4; and

(5) Other assets.

(b) *Definitions.* For purposes of this section, ''exchange-traded fund'' has the same meaning as in § 270.12d1–4(d)(2) and ''money market fund'' has the same meaning as in § 270.12d1–1(d)(2).

5. Section 270.12d1–4 is added to read as follows:

§ 270.12d1–4 Exemptions for investments in exchange-traded funds.

(a) *Exemptions for acquisition of exchange-traded fund shares.* Notwithstanding sections 12(d)(1)(A), 17(a)(1), and 57(a)(1) of the Act (15 U.S.C. 80a–12(d)(1)(A), 15 U.S.C. 80a–17(a)(1), and 15 U.S.C. 80a–56(a)(1)), an investment company (''acquiring fund'') may acquire exchange-traded fund shares if:

(1) *Control.* No acquiring fund or any of its investment advisers or depositors, and any company controlling, controlled by or under common control with the acquiring fund, or any of its investment advisers or depositors, each individually or together in the aggregate:

(i) Controls the exchange-traded fund; and

(ii) If, as a result of a decrease in the outstanding voting securities of the exchange-traded fund, any of those persons, each individually or together in the aggregate, become holders of more than 25 percent of the outstanding voting securities of the exchange-traded fund, each of those holders of shares issued by the exchange-traded fund will vote its shares of the exchange-traded fund in the manner prescribed by section 12(d)(1)(E) of the Act (15 U.S.C. 80a–12(d)(1)(E)).

(2) *No redemption.* An acquiring fund that relies on paragraph (a) of this section to acquire exchange-traded fund shares in excess of the limits of section 12(d)(1)(A)(i) of the Act (15 U.S.C. 80a–12(d)(1)(A)(i)) does not redeem any of those shares. For purposes of this paragraph, an acquiring fund will be deemed to have redeemed or sold the most recently acquired exchange-traded fund shares first.

(3) *Fees.* (i) Any sales charge, as defined in rule 2830(b)(8) of the Conduct Rules of the NASD (''sales charge''), or service fee, as defined in rule 2830(b)(9) of the Conduct Rules of the NASD (''service fee''), charged in connection with the purchase, sale, or redemption of securities issued by the acquiring fund does not exceed the limits set forth in rule 2830(d)(3) of the Conduct Rules of the NASD; and

(ii) With respect to a separate account that invests in an acquiring fund:

(A) The acquiring fund and exchange-traded fund do not charge a sales load;

(B) Any asset-based sales charge, as defined in rule 2830(b)(8)(A) of the Conduct Rules of the NASD, or service fee is charged only by the acquiring fund or the exchange-traded fund; and

(C) The fees associated with a variable insurance contract that invests in the acquiring fund and the sales charges and service fees charged by the acquiring fund and the exchange-traded fund, in the aggregate, must be reasonable in relation to the services rendered, the expenses expected to be incurred and, with respect to the variable insurance contract, the risks assumed by the insurance company.

(4) *Complex fund structures.* The exchange-traded fund has a disclosed policy that prohibits it from investing more than 10 percent of its assets in:

(i) Other investment companies in reliance on section 12(d)(1)(F) or section 12(d)(1)(G) of the Act (15 U.S.C. 80a–12(d)(1)(F) or 15 U.S.C. 80a–12(d)(1)(G)) or this section; and

(ii) Any other company that would be an investment company under section 3(a) of the Act (15 U.S.C. 80a–3(a)) but for the exceptions to that definition provided in sections 3(c)(1) and 3(c)(7) of the Act (15 U.S.C. 80a–3(c)(1) and 80a–3(c)(7)).

(b) *Exemptions for sale of exchange-traded fund shares.* (1) Notwithstanding sections 12(d)(1)(B), 17(a)(1), 17(a)(2), 57(a)(1), and 57(a)(2) of the Act (15 U.S.C. 80a–12(d)(1)(B), 15 U.S.C. 80a–17(a)(1), 15 U.S.C. 80a–56(a)(1), and 15 U.S.C. 80a–56(a)(2)), an exchange-traded

fund, any principal underwriter thereof, and a broker or a dealer may sell or otherwise dispose of exchange-traded fund shares if the exchange-traded fund does not redeem, or the principal underwriter, broker or dealer does not submit for redemption any of the exchange-traded fund's shares that were acquired by an acquiring fund in excess of the limits of section 12(d)(1)(A)(i) of the Act (15 U.S.C. 80a–12(d)(1)(A)(i)) in reliance on paragraph (a) of this section. For purposes of this paragraph, an acquiring fund will be deemed to have redeemed or sold the most recently acquired exchange-traded fund shares first.

(2) An exchange-traded fund, a principal underwriter thereof, or broker or dealer will be deemed to have complied with the condition in paragraph (b)(1) of this section if it has:

(i) Received a representation from the acquiring fund that none of the exchange-traded fund shares it is redeeming was acquired in excess of the limits of section 12(d)(1)(A)(i) of the Act (15 U.S.C. 80a–12(d)(1)(A)(i)) in reliance on paragraph (a) of this section; and

(ii) No reason to believe that the acquiring fund is redeeming any exchange-traded fund shares that the acquiring fund acquired in excess of the limits of section 12(d)(1)(A)(i) of the Act (15 U.S.C. 80a–12(d)(1)(A)(i)) in reliance on paragraph (a) of this section.

(c) *Exemption from certain monitoring and recordkeeping requirements under § 270.17e–1.* Notwithstanding the requirements of §§ 270.17e–1(b)(3) and 270.17e–1(d)(2), the payment of a commission, fee, or other remuneration to a broker shall be deemed as not exceeding the usual and customary broker's commission for purposes of section 17(e)(2)(A) of the Act (15 U.S.C. 80a–17(e)(2)(A)) if:

(1) The commission, fee, or other remuneration is paid in connection with the sale of securities to or by an acquiring fund;

(2) The broker and the acquiring fund are affiliated persons because each is an affiliated person of the same exchange-traded fund; and

(3) The acquiring fund is an affiliated person of the exchange-traded fund solely because the acquiring fund owns, controls, or holds with power to vote five percent or more of the outstanding securities of the exchange-traded fund.

(d) *Definitions. For purposes of this section:*

(1) *Depositor* includes the person primarily responsible for the organization of the unit investment trust, the person who has continuing functions or responsibilities with respect to the administration of the affairs of the trust, and the sponsor or manager of the trust.

(2) *Exchange-traded fund* has the same meaning as in § 270.6c–11(e)(4) and also includes a registered unit investment trust that satisfies the criteria set forth in § 270.6c–11(e)(4).

(3) *Exchange-traded fund share* has the same meaning as in § 270.6c–11(e)(5).

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

6. The authority citation for part 274 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

* * * * *

7. Form N–1A (referenced in §§ 239.15A and 274.11A) is amended by:

a. Adding the definitions ''Exchange-Traded Fund'' and ''Market Price'' in alphabetical order to General Instructions A;

b. Adding paragraph 5 to the Instructions to Item 2 paragraph (c)(2);

c. Adding paragraph 1(e) to the Instructions to Item 3;

d. Revising paragraph 1(a) and adding paragraph (h) to Item 6;

e. Adding paragraph 3(f) to the Instructions to Item 8(a); and

f. Adding paragraph 12 to the Instructions to paragraphs (b)(7)(i) and (ii), paragraph (iv) to paragraph (b)(7), and paragraph 1(e) to the Instructions to paragraph (d) of Item 22.

The additions and revisions read as follows:

Note: The text of Form N–1A does not, and this amendment will not, appear in the Code of Federal Regulations.

Form N–1A

* * * * *

General Instructions

A. Definitions

* * * * *

''Exchange-Traded Fund'' means a Fund whose shares are traded on a national securities exchange and satisfies the criteria set forth in rule 6c–11(e)(4) (17 CFR 270.6c–11(e)(4)).

* * * * *

''Market Price'' refers to the last price at which Exchange-Traded Fund shares trade on the principal U.S. market on which the Fund's shares are traded during a regular trading session.

* * * * *

Item 2. Risk/Return Summary: Investments, Risks, and Performance

* * * * *

(c) *Principal risks of investing in the Fund.*

* * * * *

(2) *Risk/Return Bar Chart and Table.*

* * * * *

Instructions

* * * * *

5. *Exchange-Traded Funds.*

(a) Add a caption in the ''Average Annual Total Returns'' table directly above the caption titled ''Index''. Title the caption ''Returns—Market Price''. Disclose in the caption the Fund's average annual total return based on the Market Price for the periods indicated. In a footnote to the caption, explain how Market Price returns are calculated and how they differ from NAV returns.

(b) If the Fund has an investment objective of obtaining returns that correspond to the returns of a securities index, the table must show the average annual total returns of the securities index specified in its registration statement for the same periods. The Fund may exclude the returns of an appropriate broad-based securities market index as defined in Instruction 5 to Item 22(b)(7) for the same periods.

Item 3. Risk/Return Summary: Fee Table

* * * * *

Instructions

1. *General.*

* * * * *

(e)(i) If the Fund is an Exchange-Traded Fund and issues or redeems shares in creation units of not less than 25,000 shares each, exclude any fees charged for the purchase and redemption of the Fund's creation units.

(ii) Modify the narrative explanation to state that Fund shares are sold on a national securities exchange at the end of the time periods indicated, and that brokerage commissions for buying and selling Fund shares through a broker are not reflected.

* * * * *

Item 6. Shareholder Information

(a) * * *

(1) An explanation that the price of Fund shares is based on the Fund's net asset value and the method used to value Fund shares (market price, fair value, or amortized cost); except that if the Fund is an Exchange-Traded Fund, an explanation that the price of Fund shares is based on Market Price.

* * * * *

(h) *Exchange-Traded Funds.*

(1) If the Fund issues or redeems Fund shares in creation units of not less than 25,000 shares each, the Fund may omit from the prospectus the information required by Items 6(a)(2), (b) and (c).

(2) Identify the principal U.S. market or markets on which the Fund shares are traded and the trading symbol(s) for those shares, unless the information appears on the front cover page.

(3) Specify the number of Fund shares that the Fund will issue (or redeem) in exchange for the deposit (or delivery) of basket assets as defined in rule 6c-11 [17 CFR 270.6c-11] (*i.e.*, a creation unit) and explain that individual Fund shares may only be purchased and sold on a national securities exchange through a broker-dealer.

(4) *Premium/Discount Information.* Provide a table showing the number of days the Market Price of the Fund shares was greater than the Fund's net asset value and the number of days it was less than the Fund's net asset value for the most recently completed calendar year, and the most recently completed calendar quarters since that year, or the life of the Fund (if shorter).

Instructions

1. Provide the information in tabular form.

2. Express the information as a percentage of the net asset value of the Fund, using separate columns for the number of days the Market Price was greater than the Fund's net asset value and the number of days it was less than the Fund's net asset value. Round all percentages to the nearest hundredth of one percent.

3. Adjacent to the table, provide a brief explanation that: Shareholders may pay more than net asset value when they buy Fund shares and receive less than net asset value when they sell those shares, because shares are bought and sold at current market prices.

4. Include a statement that the data presented represents past performance and cannot be used to predict future results.

* * * * *

Item 8. Financial Highlights Information

(a) * * *

Instructions

* * * * *

3. Total Return. * * *

(f) *Exchange-Traded Funds.* (i) Change the caption ''Total Return'' to ''Total Return—NAV''.

(ii) Add a caption following ''Total Return—NAV'' titled ''Total Return—Market Price''. Disclose in the caption the Fund's total return using Market Price, assuming a purchase of Fund shares at the Market Price on the first day and a sale of the shares on the last day of each period shown.

* * * * *

Item 22. Financial Statements

* * * * *

(b) *Annual Report.* * * *

(7) *Management's Discussion of Fund Performance.* * * *

Instructions

12. *Exchange-Traded Funds.*

(a) Include a second line graph immediately following the line graph required by paragraph (b)(7)(ii)(A) of this Item, assume an initial investment of $10,000 was made at the Market Price on the business day before the first day of the first fiscal year, and base the subsequent account values on the Market Price on the last business day of the first and each subsequent fiscal year. Calculate the final account value by assuming the investor sold all Exchange-Traded Fund shares at the Market Price on the last business day of the most recent fiscal year.

(b) For purposes of the table required by paragraph (b)(7)(ii)(B) of this Item, add a caption titled ''Returns—Market Price''. Disclose in the caption the Fund's average annual total return based on Market Price for the periods indicated. In a footnote to the caption, explain how Market Price returns are calculated and how they differ from returns based on net asset value.

(c) If the Fund has an investment objective of obtaining returns that correspond to the returns of a securities index, the table must show the average annual total returns of the securities index specified in its registration statement for the same periods. The Fund may exclude the returns of an appropriate broad-based securities market index as defined in Instruction 5 to paragraph (b)(7)(i) and (ii) of this Item for the same periods.

* * * * *

(iv) *Premium/Discount Information.* Provide a table showing the number of days the Market Price of the Fund shares was greater than the Fund's net asset value and the number of days it was less than the Fund's net asset value for the most recently completed five fiscal years (or the life of the Fund if shorter), but only for periods subsequent to the effective date of the Fund's registration statement.

Instructions

(a) Provide the information in tabular form.

(b) Express the information as a percentage of the net asset value of the Exchange-Traded Fund, using separate columns for the number of days the Market Price was greater than the Fund's net asset value and the number of days it was less than the Fund's net asset value. Round all percentages to the nearest hundredth of one percent.

(c) Adjacent to the table, provide a brief explanation that: Shareholders may pay more than net asset value when they buy Fund shares and receive less than net asset value when they sell those shares, because shares are bought and sold at current market prices.

(d) Include a statement that the data presented represents past performance and cannot be used to predict future results.

* * * * *

(d) Annual and Semi-Annual Reports. * * *

Instructions

1. General.

* * * * *

(e) (i) If the Fund is an Exchange-Traded Fund and issues or redeems shares in creation units of not less than 25,000 shares each, exclude from the narrative explanation and the Example any fees charged for the purchase and redemption of the Fund's creation units.

(ii) Modify the narrative explanation to state that Fund shares are sold on a national securities exchange at the end of the time periods indicated, and that brokerage commissions for buying and selling Fund shares through a broker are not reflected.

* * * * *

Dated: March 11, 2008.

By the Commission.

Nancy M. Morris,

Secretary.

[FR Doc. E8–5239 Filed 3–17–08; 8:45 am]

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S. 2745/P.L. 110–196

To extend agricultural programs beyond March 15, 2008, to suspend permanent price support authorities beyond that date, and for other purposes. (Mar. 14, 2008; 122 Stat. 653)

S.J. Res. 25/P.L. 110–197

Providing for the appointment of John W. McCarter as a citizen regent of the Board of Regents of the Smithsonian Institution. (Mar. 14, 2008; 122 Stat. 655)

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